THE CENTRAL LAW JOURNAL

SEYMOUR D. THOMPSON, Editor. } ST. LOUIS, FRIDAY, JULY 23, 1875. { Hon. JOHN F. DILLON, Contributing Editor.

IN publishing the case of the Queen v. Taylor, in our last issue, we inadvertently omitted to credit the report of the case to the Weekly Reporter.

THE publishers desire us to say to those of our readers who are subscribers to the SOUTHERN LAW REVIEW, that by an unforeseen and unavoidable delay, occasioned by high water at the mill which furnishes their supply of paper, they have been prevented from issuing the July number of the REVIEW at the appointed time. It is now in press, and will be out in a day or two.

IN the case of Terry v. The Imperial Fire Insurance Company (*ante* p. 459) the opinion was delivered by Mr. District Judge Foster, and not by Mr. Circuit Judge Dillon. The latter, however, concurred. The mistake came from the fact that the opinion came to us not signed, but certified by the clerk of the *circuit* court, and we took it for granted that it was Judge Dillon's opinion.

Bolton v. Dickens.

Our general disinclination to publish decisions of the state courts at *nisi prius*, has yielded this week in the case of Bolton v. Dickens, recently decided by Chancellor Morgan at Memphis, Tennessee. Apart from the fact that some of the points in judgment are new in that state, this case has become notorious on account of the many tragedies connected with it and growing out of the transactions involved in it. The parties were all related, more or less, by consanguinity or marriage. In May, 1857, Isaac L. Bolton killed one W. Millen, under circumstances which created great excitement. He was tried for murder and acquitted. The expenses of his defence have been said to be quite $100,000, and their payment is one of the matters connected with this case, it being alleged on one side that the partnership agreed to pay them because the trouble arose in defence of the rights of the firm, and the agreement to pay being denied by the partners, who are suing. During the progress of a trial collateral to this suit, on one occasion in open court before the Chancellor, the parties opened fire with their pistols and one or two persons were wounded.* Not long after, the house of Thomas Dickens was attacked in the night time and several persons killed, he himself being wounded. The perpetrators of this deed were hunted to the mountains, and, it is said, killed. After this, Wade Bolton was killed by Thomas Dickens on the streets, and subsequently Dickens was assassinated on the road-side. Samuel Dickens, a son of Thomas Dickens, was after this killed by the accidental discharge of his own weapon. Since the suit was commenced, the house of Wade Bolton was destroyed by fire, he alleging that it was done at the instigation of Dickens to destroy the firm's books which he had in possession, and Dickens alleging that it was done by Wade Bolton himself to destroy the books, so that they could not be used in evidence against him. Wade Bolton's will is a notable document. He being childless, after provision for his wife, gave the bulk of his large estate to found a college to be named after him, a legacy of $10,000 to Stonewall Jackson's widow, and then certain legacies to his nephews and nieces, with the condition precedent that they should lend their aid to defeat this suit—"the gigantic swindle of the old land-pirate Thomas Dickens, and his ally and tool, Sarah W. Bolton." The record of the case carries one back to the days when the institution of slavery was in the height of its prosperity, and yet, as it afterwards transpired, in the first stages of a rapid decay. For these facts, as well as for the report of the case elsewhere published, we are indebted to E. S. Hammond, Esq., one of the counsel in the case.

* "We" were there, and went after the doctor.—[Ed. C. L. J.

The New York Court of Arbitration.

Last year, we believe, the experiment was first tried in the United States, under such auspices as to command general attention, of the establishment of a court for the speedy arbitration of matters of difference between merchants. It was fit that the experiment should first be tried in the commercial metropolis of America, in order that its success or failure might be an admonition to other cities seeking the establishment of like tribunals. The information which has reached us through our legal exchanges, warrants us in saying that the experiment in New York has been eminently successful. By an act of the last legislature of New York, the court was organized and established upon a permanent basis. This act is given in full in the New York Daily Register of July 9th. The judge, who is styled "the official arbitrator," holds his office during good behavior, but may be removed by the governor, if, upon due notice, and after a hearing, he is found guilty by the governor of malfeasance, misfeasance or continued non-feasance in office. His salary is $10,000 a year, the same as that of the judges of the courts of record of that city. There is also a clerk, who holds his office during the pleasure of the Chamber of Commerce, whose salary is $3000 a year. It thus appears that the compensation of the clerk is not more than that of the judge, which often happens in other states where a system of fees constitutes the compensation of clerks of courts. The act looks only to the *voluntary* submission of matters in dispute. These are to be speedily heard, and the arbitrator is to make his award in writing within ten days. The award is filed with the clerk of the county of New York, and is enforced in the same manner, by the same process and the same officers, as a judgment of the Supreme Court. The final award, the order to enforce the same and the judgment to be entered thereupon, may be vacated for fraud, collusion or corruption, but not for any other cause. Unless it is so vacated, the award is binding and conclusive upon all parties thereto, and effects a final settlement of the controversy submitted. It is required to be upheld and sustained accordingly in all the courts of the state. Provision is made that either party to a dispute may appoint an assistant arbitrator to sit with the official arbitrator; and if one disputant appoints one, and the other does not, then the second one is to be appointed by the official arbitrator.

It seems that lawyers cannot be entirely dispensed with in such a court, although we notice no provision in the act, or in the rules of the court, with regard to attorneys; yet the arbitrator himself, who has administered this court of conciliation with so much success during the past year, is Judge Fancher, a ripe jurist, formerly a judge of one of the courts of that state.

Right of Holder of Dishonored Promissory Note to Recover Protest Fees.

The question has often been mooted, Has the holder of a promissory note, negotiable by the law merchant, being an endorsee in regular course of business, a right, upon non-payment by the maker, to have the same protested and to recover protest fees against the maker or endorser? This is a question of some importance, since half the business of the country is done through these instruments, and a custom is rapidly growing up, especially among the banks, to have notes and inland bills protested the same as foreign bills.

By the common law neither notes nor inland bills were protestable, and the certificate of a notary was not evidence of either a presentment or notice of non-payment, and this was because such protest was not required by law, and was hence not an official act. Chitty on Bills, 170, 334-5. Borough v. Perkins, 1 Salk. 131; Brough v. Parkins, 3 Salk. 69; Chesmer v. Noyes, 4 Camp. 129; Marin v. Palmer, 6 C. & P. 466; Chitty on Bills, 454-5, 465-6. Nevertheless inland bills were sometimes protested in England under the common law, before any statutes were passed authorizing such protests. If, however, it was not evidence of the dishonor, it is not easy to see what object could be accomplished thereby, nor what motive could actuate the holder, since it was well settled that the notarial fees could not be charged against prior parties. Chitty on Bills. 466, 683; Kendrick v. Lomax, 2 Cromp. & Jerv. 407. The rule in England, it is fair to presume, was founded upon the general principle that a protest in such cases was not necessary; that the object and efficacy of a protest was, as in the case of foreign bills, to accompany the bill into foreign countries, there to attest the dishonor of the bill, as the mode of proof prescribed by the common consent of all commercial countries, to avoid the delay and expense of the ordinary course of proving facts abroad; and that no such exigency or object could apply in the case of an inland bill, where presentment and notice of non-payment by the holder or his agent would answer every purpose of a protest. The courts would never permit one party to incur unnecessary expense for another party to pay.

By the statute 9th and 10th William III., c. 17, however, it was enacted that inland bills for five pounds or upwards, expressed to be for value received, and payable at a definite time after date, might, after acceptance, be protested for non-payment. This statute expressly required the party from whom the bill was received, upon notice being sent according to its provisions, to pay the bill with all interest and charges from the day it was protested, and the fees for protest were fixed at a sum not to exceed sixpence. This statute was construed not to require a protest, but only to make one optional—to give an additional remedy. Its only effect was to give the notary's certificate the character of an official document and make it independent evidence, in cases coming within its provisions. Chitty on Bills, 465-6; Harris v. Benson, 2 Strange, 910; Lumley v. Palmer, 2 Strange, 1000; Windle v. Andrews, 2 B. & Ald. 696.

Promissory notes were, by statute of Anne, put upon the same footing as inland bills; and as a general rule statutes referring in terms to the latter, apply equally to the former. This is otherwise only in cases where the reference is to properties of the one not common to both. It has never been held by the courts in England, that expenses of protest were chargeable upon notes or inland bills, except in the case above referred to, where it was expressly authorized by Act of Parliament; nor has it ever been held, either in England or any of the United States, where these instruments were governed by the law merchant, that a protest in any case was necessary, in order to fix the liability of prior parties. Now, I presume, the law merchant prevails in regard to this question in nearly, or all the states. States where it does not, however, and where such charges are provided for by statute, form exceptions.

By what right, or upon what authority, then, do banks and other holders of these instruments charge, and collect protest fees? In Arkansas, and I presume in most other states, there are statutes changing the law merchant to the extent of providing that notes may be protested, and that the protest and notice by the notary shall be *prima facie* evidence to fix the liability of the endorser. Nevertheless the courts have almost unanimously held the very ground upon which, in England, a charge of protest fees was denied—that the protest of notes was neither obligatory nor necessary, no more where these statutes prevail than where the common law remains unchanged; but, as said by Judge Story (see his work on Promissory Notes, page 297), the practice "is simply an arrangement made for the convenience of the holders." See Burke v. McKay, 2 How. Sup. Ct. R. 66; Pinkham v. Macy, 9 Met. 174; Coddington v. Davis, 1 Comst. 185; Young v. Bryan, 6 Wheat. 146. If it be said that the right to charge protest fees, follows the right to go to protest as provided in these statutes, it may be answered that the position is directly opposed to all the authorities, which hold that the protest of inland bills being unnecessary, no fees are chargable. If the statute 9 and 10 Will. III, ch, 17, required, in addition to the authority to protest inland bills, an express provision authorizing such charge, then the same should be true of these statutes. The question has seldom been drawn into litigation in this country, for the evident reason that the amount is so small in each individual case as not to be worth contending for, and it is for this very reason that the practice has grown into a huge oppression upon a small scale, in which official patronage is multiplied, banks reap large profits, and all or most of which is at the expense of small debtors, as these are the parties oftenest compelled to go to protest, and upon whose debts the percentage of expense is a thousand fold perhaps greater than that upon the large debts of the capitalist.

The only direct authorities upon the question, which I am able to find, are the cases of The City Bank v. Cutter, 3 Pick. 414; Merritt v. Benton, 10 Wend. 116, and Doughty, Diblee & Co. v. Hildt, 1 McLean, 334. In the first case the charge

was denied by the Supreme Court of Massachusetts, on the true ground that a protest was unnecessary. In the second, it was allowed by the Supreme Court of New York, without reason or comment, other than that "it might fairly be considered as a charge incident upon the endorser's failure to perform his contract." This moreover was a suit against an accommodation endorser, and upon well known principles a distinction might have been taken between such a case and one against a maker or endorser for value, upon a regular transfer. In the last case cited, Judge McLean allowed the charge upon a judgment by default, and seemed to take a distinction between such case, and a judgment after full defence. The case cited from 7 Cranch, 273, in support of his position wholly fails to sustain him.

The question has, therefore, in the main, been left to be decided and controlled by those general principles which we have referred to governing inland bills by the law merchant, and by which no protest fees were chargable except when the protest was obligatory as in cases of foreign bills, or when made so and the fees allowed by express statute. In this view all the authorities in England and America settling this principle, as well as those deciding that the maker of a note and the acceptor of a bill (except in case of foreign bills), can in no case be liable for more than the principle of the note or the amount of the acceptance with interest, are directly appliable to the question. See Chitty on Bills, 683–4; Simpson v. Griffin, 9 John. 131; Napier v. Shneider, 12 East, 420; Hanrick v. Farmers' Bank, 8 Port. (Ala.) 539.

SOL. F. CLARK.

LITTLE ROCK, ARK., July 14th, 1875.

Power of National Banks to act as Bond Brokers—Liability for Damage accruing through Sale of Worthless Bonds—Ultra Vires.

MECKLER v. THE FIRST NATIONAL BANK OF HAGERSTOWN.

Court of Appeals of Maryland, April Term, 1875.

Present, Hon. JAMES L. BARTOL, Chief Judge.

" J. A. STEWART,
" RICHARD GRAYSON,
" RICHARD H. ALVEY,
" OLIVER MILLER,
} Associate Judges.

1. **National Banks as Bond-Brokers—Liability for Sale of Worthless Bonds—Ultra Vires.**— Under the 8th section of the act creating National Banks [Revised Statutes of the United States, § 5,136], and the other acts of Congress relating to such banks, no power is conferred on them, either directly or by implication, to engage in the business of selling the bonds of railway corporations on a commission. Therefore, an action can not be maintained against a national bank for damages sustained through the misrepresentations of its teller as to the character of the bonds of a railway company which it sells to a customer. The power to engage in such a transaction not having been conferred upon the bank by the statutes creating and regulating it, the bank may set up the defence of *ultra vires* in such an action.

2. **Payment of Draft in Worthless Railway Bonds—Liability—Conclusion upon the Facts.**—*It seems* that if a customer of a national bank were to present at its counter a draft for collection, and the teller of the bank should induce the customer to accept in payment worthless railway bonds, by representing them to be good, the teller would be in that respect acting within the scope of his employment, and the bank would be liable for the consequent damages,—on the same principle that it would be liable in case of the paying over its counter of worthless or depreciated bank-notes. But upon an examination of the evidence, it is held that no such case arises on this record.

Appeal from the Circuit Court for Washington County, Maryland. The case is stated in the opinion. It was argued at length for the bank by *Albert Small* and *George Schley*, Esqrs. We do not know who represented the appellant. A copy of the valuable brief which was submitted by the counsel for the bank, may be obtained by addressing Albert Small, Esq., Hagerstown, Md.

MILLER, J., delivered the opinion of the court.

A question of importance and of first impression in this state arises on this appeal. The suit was instituted by the appellant against the appellee, a national bank organized under the act of Congress approved June 3, 1864, known as the "National Currency Act." The first and second counts of the declaration aver, in substance, that the defendant, as a part of its business as such banking association, was engaged in the sale of the bonds of the Northern Pacific Railroad Company, and in soliciting orders for the purchase of the same, and receiving commissions for such sales and orders; and by means of certain specified false, fraudulent and deceitful representations made by its teller, the plaintiff was induced to and did purchase from the bank two of said bonds of $500 each, and paid the bank therefor the sum of $1000, and was thereby damnified. The case was tried upon issue joined on the plea of not guilty. There was conflicting proof as to the making of the alleged false representations by the teller. The court rejected all the prayers offered on both sides, and instructed the jury, in effect, that the national banking act, under which the defendant was organized, limits the action of the bank to the pursuit of the objects specified in the act of Congress; and that the purchase and sale of such bonds is not within the chartered powers of the defendant; and that the plaintiff can not recover against the defendant in this action, although the jury may find from the evidence, that the teller of the bank fraudulently induced the plaintiff to purchase the bonds in question, by making the alleged false representations, and that she suffered loss thereby.

This presents broadly and clearly the question whether the bank had authority, under the act of congress, to engage in the business of selling bonds of railroad companies on commission.

A bank, like other private corporations, is confined to the sphere of action limited by the terms and intention of its charter. The supreme court, in the case of The Bank of the United States v. Dandridge, 12 Wheat. 68, states the rule by which the powers of the bank are to be determined, thus: "Whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute must depend both for their powers and the mode of exercising them, upon the true construction of the statute itself." And in that case the court adopts as entirely correct and applicable to the bank, the doctrine laid down by Chief Justic Marshall, in 2 Cranch, 167, in reference to an insurance company, viz.: "Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may be correctly said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exercising its faculties only in the manner in which that act authorizes." And in this state the law is well settled that a corporation created for a specific purpose, not only can make no contract forbidden by its charter, but in general can make no contract which is not necessary either directly or indirectly to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, it must be considered in the first place, whether its charter or some statute binding upon it, forbids or permits it to make such a contract; and if its charter and valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied upon the part of the corporation, as directly or incidentally necessary to enable it to fulfil the purpose of its existence; or whether the contract is entirely foreign to that purpose. A corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the pow-

ers expressly granted. Penn., Del. & Md. Steam Navigation Company v. Dandridge, 8 Gill. & J. 318, 319.

We must therefore determine the true construction of the act of Congress, authorizing the formation of these banking associations, and whether the power to make contracts like the one in question is expressly conferred upon them, or is directly or indirectly necessary to enable them to fulfil the purpose of their creation, or is entirely foreign to that purpose.

So far as the purpose of the law is indicated by its title, it is: "To provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." After prescribing in previous sections the mode by, and the conditions under which banking associations may be formed, the 8th section declares that every association so formed, shall become a body corporate from the date of its certificate of organization, but shall transact no business "except such as may be incidental to its organization, until authorized by the comptroller of the currency to commence the business of banking." Power is then given it to adopt a corporate seal, to have succession by the name designated in its organization certificate, and in that name to make contracts and sue and be sued, to elect directors and other officers, "and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this act."

This is the only portion of the statute to which, for the purposes of this case, it is necessary to refer. By it the associations are not simply incorporated *as banks*, and the scope of their corporate business left wholly to implication, but the kind of banking which they may conduct is limited and defined. As we read the language of this 8th section, it authorizes the associations to carry on banking "by discounting and negotiating promissory notes," etc., and to exercise "all such incidental powers" as shall be necessary to conduct that *business*. The mode in which the incidental powers may be exercised is not defined, but all incidental powers which they can exercise must be necessary or incidental to the business of banking thus limited and defined. To the usual attributes of banking, consisting of the right to issue notes for circulation, to discount commercial paper and to receive deposits, this law adds the special power to buy and sell exchange, coin and bullion; but we look in vain for any grant of power to engage in the business charged in this declaration. It is not embraced in the power to "discount and negotiate" promissory notes, drafts, bills of exchange and other evidences of debt. The ordinary meaning of the term "to discount" is to take interest in advance, and in banking is a mode of loaning money. It is the advance of money not due until some future period, less the interest which would be due thereon when payable. The power "to negotiate" a bill or note is the power to endorse and deliver it to another so that the right of action thereon shall pass to the endorsee or holder. No construction can be given to these terms, as used in this statute, so broad as to comprehend the authority to sell bonds for third parties on commission, or to engage in business of that character. The appropriate place for the grant of such a power would be in the clause conferring authority to "buy and sell," but we find that limited to specific things, among which bonds are not mentioned, and upon the maxim, *Expressio unius est exclusio alterius*, and in view of the rule of interpretation of corporate powers before stated, the carrying on of such a business is prohibited to these associations. Nor can we perceive it is in anywise necessary to the purposes of their existence, or in any sense incidental to the business they are empowered to conduct, that they should become bond-brokers, or be allowed to traffic in every species of obligations issued by the innumerable corporations, private and municipal, of the country. The more carefully they confine themselves to the legitimate business of banking, as defined in this law, the more effectually will they subserve the purposes of their creation. By a strict adherence to that they will best accommodate the commercial community, as well as protect their share-holders.

Such is our construction of this statute, and it is supported by the best considered authorities, and the decided preponderance of judicial opinion in other states.

This eighth section is almost identical in terms (and as respects the present question completely so) with the Banking Act of New York of 1838, ch. 260; and the Court of Appeals of that State, in Talmage v. Pell, 3 Selden, 328, held that banking associations, formed under that law, have authority only to carry on the business of banking in the manner and with the powers specified in the act, and have no power to purchase state stocks to sell at a profit or as a means of raising money except when received as security for a loan or taken in payment of a loan or debt. In speaking of the transaction under review in that case, the court says, the banking company "purchased these bonds as they might have purchased a cargo of cotton to send to market, to be sold at the risk of the vendor for the highest price that could be obtained. No authority to traffic in either commodity is expressly given by the law of 1838. It is, therefore, claimed as a power incident to the business of *banking*. But the 18th section of the act declares that this business shall be carried on by discounting bills, notes and other evidences of debt, by loaning money on real and personal security, by buying and selling gold and silver bullion, foreign coin and bills of exchange, etc. The subjects pertaining to the business of banking are designated, and the express powers of the association are limited to them and to such incidental powers as may be necessary to transact the business thus defined by the legislature." They then proceed to show that the claim to base the validity of the contract upon any incidental power is unfounded, and pronounce the transaction illegal, and the assignment by the company of the mortgages which they held, as collateral security for the purchase, void. So also in recent decisions of the courts of last resort, in several of the states where this act of Congress, and especially its 8th section, has been considered, we find it construed in entire accord with the view we have taken of it. We refer to Fowler v. Scully, 72 Penn. St. 456; Shinkle v. First National Bank of Ripley, 22 Ohio St. 516; Wiley v. First National Bank of Brattleboro', decided by the Supreme Court of Vermont at its February term, 1875,* and First National Bank of Lyons v. Ocean National Bank, decided by the Court of Appeals of New York, and reported in the Albany Law Journal of April 17, 1875.† In the last mentioned case there is a very able opinion of the court by Allen, J., in which he says he fully concurs in the views expressed by Judge Wheeler in the Vermont case, and in reference to the case of Van Leuven v. First National Bank of Kingston, shortly reported (the opinion of the judges not being given) in 54 N. Y. Reps. 671, which has been pressed upon our attention by the appellant's counsel, he says it decided no general principle, but by a divided court it was determined that the contract in that case, under the circumstances, was the contract of the corporation and not the individual contract of the president.

We are, therefore, clearly of opinion that this business of selling bonds on commission is not within the scope of the powers of these corporations, and the bank could not, under any circumstances, carry it on: and being thus beyond its corporate powers, the defence of *ultra vires* is open to the appellee. 8 Gill. & J. 348. It follows from this that the bank is not responsible for any false representations made by its teller to the appellant by which she was induced to purchase the bonds in question. Hence there was no error in the court's instruction to the jury nor in the rejection of the appellant's first and second prayers.

* Reported, 2 Cent. L. J. 271, note.

† Reported also in 2 Cent. L. J. 267.

But by the third and fourth counts of the declaration, and the appellant's third and fourth prayers, it is sought to give another character to the transaction and to place the right to recover upon a different ground.

They present the case in this view, viz.: That there was no sale and *purchase* of the bonds but by the false representations of the teller the appellant was induced to *receive* them, instead of money, in payment of the draft on New York, which she presented at the bank to be cashed or collected. It is argued that, in this aspect, the transaction amounts to the same thing as if the teller had cashed the draft by paying her over the counter in depreciated or worthless bank notes, representing them to be good. But the answer to this position is that there is no evidence in the record to support it. The proof shows that on the 6th of October, 1871, the appellant presented at the bank a draft on New York for $1047, and asked the teller if it was good, and if he would cash it. The teller gave her $47 in money and a certificate of deposit for the balance to the effect that she has "deposited in this bank $1000 payable to the order of herself on return of this certificate properly endorsed." This instrument is in the usual form of a certificate of deposit, bears date the 6th of October, 1871, and is signed by the teller for the cashier. There is a discrepancy in the testimony as to whether anything was said at that time about investing her money in Northern Pacific bonds. According to her testimony, as stated in the record, it may be inferred the alleged false representations were then made, but whether before or after she received the certificate of deposit does not clearly appear; and, according to the testimony on the other side, nothing was said about these bonds until some ten or twelve days thereafter, when she returned and insisted upon investing her money. But it is immaterial when this occurred, because it is an undisputed fact that she received and accepted the certificate on that day, long before the bonds were delivered to her. The draft to the extent of $1000 was received by the bank as money, and as such it passed to her credit, and she became the creditor of the bank for that amount as an ordinary depositor. Whatever may have been said at or before this time, it is clear beyond dispute that by this transaction the draft was, as between herself and the bank, cashed or converted into money, which became hers in the coffers of the bank to use and dispose of as she saw fit. It is further shown by undisputed testimony that these bonds were ordered by the cashier from the Baltimore brokers, and received on the 19th of October, 1871, a few days after the order for them was sent; that they remained in the bank until some time in April following, when the appellant, either in person or through an agent, *returned* the certificate of deposit and got the bonds, paying the interest accrued at the time of the purchase out of the January coupons on the bonds which the teller then cashed for her; that she thereafter retained the bonds, collecting the interest upon them up to July 1, 1873, and that they were sold in the market at par and accrued interest up to the financial crisis in the fall of 1873. From these facts the law can regard the transaction in no other light than as a *purchase* of these bonds by the appellant through the teller or cashier, she paying therefor her own money deposited to her credit in the bank. It was entirely competent for the bank to receive the draft for collection, or to accept and receive it as a deposit of so much money; and there is no evidence in the case legally sufficient to authorize a jury to infer that the teller (acting as he would be in that respect in the discharge of his duty and within the scope of his employment) cashed the draft by passing off upon her these bonds instead of money in payment therefor. For these reasons there is no error in the rejection of the last two prayers of the appellant, and the judgment must be affirmed. Having disposed of the case in this way, it become unnecessary to express any opinion upon the question argued at bar whether an action like this will lie against a corporation in its corporate character for deceit practiced by its officers or agents.

JUDGMENT AFFIRMED.

Carriage of Passengers by Sea — Injuries from Falling Freight—Measure of Damages.

ERNESTINE KOCH v. THE OREGON STEAMSHIP Co. AND THE ORIFLAMME — IN ADMIRALTY.

United States District Court, District of Oregon, June 30, 1875.

1. **Common Carriers of Passengers—Degree of Care and Diligence required.**—Common carriers of passengers are bound to use extraordinary care and diligence, and are excused only by reason of force or pure accident.

2. **Right of Passenger on Steamship to a Berth.**—An undertaking to carry a passenger of a steamship from San Francisco to Portland, includes the furnishing of such passenger with a berth, unless there is a fair understanding to the contrary.

3. **Right of Steerage Passenger to Exercise— May not be required to remain in Berth.**—A steerage passenger is entitled to the use of the steerage room, to walk about or sit down in during the voyage, without the risk or inconvenience of freight therein; but if freight is stowed therein it is at the risk of the carrier, and it is his duty so to stow and secure it that no harm will be caused to the passengers by it; nor can the carrier impose any arbitrary regulation upon the passengers, with a view of diminishing such risk—such as to remain in their berths during the voyage, or any unusual portion of it.

4. **Injury to Passenger from Tumbling of Freight in Rough Weather—Case in Judgment.**—Where a number of boxes of tin were stowed in the after part of the steerage, so as to make a pile six feet in length, 3 feet in width and from 5 to 8 feet in height, without any means of preventing the top tier from sliding off on the floor in case of rough weather; and a steerage passenger sat down by the side of said pile, and was injured by the rolling of the ship, causing some of the boxes to fall upon her. *Held*, That the stowing of the tin in the manner in which it was done was gross negligence, and the carrier was liable to the passenger in damages for the injury.

5. **Measure of Damages — Disfigurement of Person.** — Disfigurement of the person caused by such an injury is a proper subject of damages, but in estimating them it is proper to consider the condition and circumstances of the party disfigured.

DEADY, J.— This suit is brought by the libellant—Ernestine Koch, to recover $3,000 damages for injuries to her person, caused by the negligence of the respondent and claimant—the Oregon Steamship Co., while engaged in transporting her in the steerage of the steamship Oriflamme, from San Francisco to Portland.

It is substantially alleged in the libel, that a number of boxes of tin were so negligently and insecurely stowed in the steerage, that the rolling of the ship caused some of them to be thrown on the libellant, whereby she was greatly injured and disfigured.

The respondent admits the contract to carry the libellant, and that she was slightly injured during the voyage, but alleges that the boxes of tin were securely stowed in the steerage; that the libellant was furnished with a berth and directed to remain in it, while crossing the San Francisco bar and during rough weather; but that the libellant left her berth and negligently sat down by said pile of tin, upon some packages of baggage belonging to the steerage passengers, when the motion of the ship caused said packages to roll from under her, and "she was thereby thrown upon the floor of the steerage, and one of said packages of baggage was rolled against the libellant, and she was thereby, or by being precipitated against the standard supporting the berths, slightly bruised."

In addition to the libellant, ten witnesses from among the steerage passengers, were examined on her behalf as to the circumstance of the alleged injury. They were all Germans, but had no particular acquaintance or relation with the libellant, and so far as appeared, testified fairly and without prejudice.

For the respondent, three witnesses were examined in relation to such circumstances—namely, the steerage steward, the porter and the second mate. All these witnesses belong to the ship, and testify under circumstances calculated to induce them to speak as favorably for the respondent as possible. Particularly is this the case with the mate, who is responsible for the manner in which the tin was stowed, and the steerage steward, whose duty it was to provide the libellant with a berth, if possible. The steward's testimony is not consistent with itself, and is in direct conflict on material points with that of other witnesses, who appear to be credible. He states that the pile of tin was not more than 18 inches high; and that he gave libellant a berth, which she declined to

occupy. The second mate says the pile was from 22½ to 25 inches high, and contained four tiers of boxes. The porter's testimony is silent as to the height of the pile prior to the accident. The men who stowed the tin under the direction of the mate, were not called by the respondent, nor their absence accounted for. Neither was the chief steward, although he appears to have been in the steerage assisting in taking care of the libellant, immediately after the accident.

The libellant and six of the steerage passengers, swear positively that the pile was upwards of five feet high, and the others states the circumstances concerning the casualty, which strongly tends to prove the truth of this statement. For instance, if the pile of tin was only 18 inches or two feet high, it is impossible that these passengers could have found the libellant on the floor, with some of the boxes of tin on top of her, as they testify, unless the ship had turned upside down.

I find the facts to be as follows: The libellant, a respectable German servant-girl, of 19 years of age, on March 20, 1875, at San Francisco, while emigrating from Germany to Oregon, took passage on the respondent's steamship—the Oriflamme—for this port. The family with which she lived in Germany were cabin passengers on the same vessel, and had procured her a steerage ticket for $15.

The libellant could not speak English, and the steward in charge of the steerage could not speak German. Several of the passengers appear to have been without berths or sleeping accommodations of any kind. No berth was assigned to the libellant, nor was there any vacant one which she might have occupied, except a lower one which was in an unfit condition.

In the after part of the steerage, a number of boxes of tin weighing about one hundred pounds each, were stowed against the bulkhead, dividing it from the freight-room, making a pile of about six feet across the vessel, three feet fore and aft, and from five to eight feet high. The pile was somewhat in a pyramidal form—sloping back towards the bulkhead, and centre from the lower tiers or base. Cleats were put around the base of the pile to keep it from shifting bodily, but there were no means taken to keep the upper tiers in their place, or from slipping off the pile. Around the base of the pile was stowed a number of carpet-sacks and hand trunks, and bundles belonging to the steerage passengers.

The ship left the dock between 10 and 11 o'clock A. M., and the libellant at the suggestion of some of the Germans in the steerage, placed her carpet-sack at the end of the pile on the starboard side of the ship, and sat down on it. Somewhere about 1 o'clock of the same day, between the San Francisco bar and Point Reyes, and about five or six miles north of the bar, while the vessel was going at usual speed, with a heavy swell on her side, she rolled so far over to starboard that several of the boxes of tin slipped off the top of the pile, and struck the libellant on her head and right shoulder, and threw her forward on her face. Several of the passengers immediately ran to her assistance, when they found her stunned or fainted away, while the carpet-sacks, hand-trunks and boxes of tin were lying around her, and some of the latter on her body and legs. They immediately removed the boxes, and drew her from among them. Word of the accident was at once sent on deck, and the steerage steward and the porter—the latter of whom could speak German—came down and took charge of the girl. Her face was covered with blood from a contused cut to the bone on the forehead over the right eye, and about one inch in length. Her right shoulder and arm were badly bruised, as were also her legs—and particularly one of her ankles. After cleansing her face and binding up the wound on her forehead, they placed her in a berth in the steerage, where she remained without any other care or attention, so far as appears, until the next day, when she was removed to the lower or servants' cabin in the after part of the vessel, and placed in a berth, where she remained until she reached Portland and left the vessel.

The medical experts are of the opinion that the bone was not injured by the wound on the forehead, although it may have been. It is not yet healed. For some reason not satisfactorily explained by the testimony, the wound does not heal and still suppurates. At times the libellant suffers severe pain in the head on account of it, and can not do labor which requires her to exert herself by lifting or stooping. Still, it is not probable that any permanent injury will result from the wound. But she received a very severe shock of the brain, and came very near losing her life. The scar resulting from the wound will be permanent, and somewhat disfigure the libellant. It will be about ¾ of an inch in length, ⅛ of an inch in greatest width, and irregular in outline. The arm and lower limbs are recovered from the bruises.

The libellant does not appear to have been visited by the master of the ship after the accident, or to have received any medical attendance or special care or nursing. She was lying in the berth on her back, probably in a partially comotose or delirious state, most of the time, until she reached Portland. During this time she was visited occasionally by the stewardess and porter, but took no food or nourishment, and did not change her clothes. She was able to walk when removed from the steerage to the lower cabin, with the assistance of a person on either side, and walked to a house near by when she left the ship at Portland; but she was confined to her bed for some days afterward, during much of which time she had fever and was delirious. Within two weeks after her arrival in Portland she went into service in a family in the city, where she still remains, but is not yet able to do a woman's work on account of her head.

Upon this state of facts there can be no doubt as to the liability of the respondent. In Shearman & Redfield on Neg., § 266, the rule in regard to carriers of passengers is laid down as follows:

"Out of special regard for human life, and acting upon the presumption that every man who commits his person to the charge of others expects from them a higher degree of care for his bodily safety than they would bestow upon the preservation of his property, the law very wisely exacts from a carrier of passengers for hire the utmost care and skill which prudent men are accustomed to use under similar circumstances."

There does not appear to have been any special contract that the libellant was to be furnished with a berth during the voyage, nor has it been shown that there is any statute of the United States applicable to the subject. For although on this occasion the Oriflamme sailed from a "port in the United States," to a port "on a tributary of the Pacific Ocean," and is, therefore, within the letter of § 4,265 of the R. S., I can not think she was within the spirit of it or within the contemplation of Congress when this act was enacted. Still, I think the undertaking to carry a passenger, either in the steerage or cabin, between the ports of San Francisco and Portland, ought to be construed to include the furnishing of such passenger with a berth, unless there was a fair understanding beforehand, that the passenger was to make the voyage without it; and this is particularly so in the case of a female passenger travelling alone. The want of a statute of the United States imposing a penalty upon the carrier for not furnishing berths upon this route, does not affect the question of whether he is bound to do so by his undertaking or not. Such an omission only proves that Congress has not yet seen proper to secure the performance of the contract of the carrier in this respect, by the imposition of a penalty for non-performance. And this seems to have been the theory of the matter upon which the answer of the respondent was framed, for, as has been stated, it is therein alleged, that the libellant was furnished a berth.

There was, then, negligence upon the part of the ship in not furnishing the libellant a berth. But it does not necessarily follow that this negligence was the cause of the injury received by the libellant. It might have happened, as it did, even if the libellant had been furnished with a berth; for she was not bound to stay in

it. She had a right to be up and about in the steerage, if she was able and so inclined, and it was the duty of the respondent to keep the steerage room a safe place for her to walk about or sit down in, so far as the utmost care and skill of a cautious, prudent person would provide under like circumstances.

Ordinarily, the steerage passengers are entitled to the use of the steerage room, free from the risk or inconvenience of freight therein. Cases may arise in which the passengers are so few in number in proportion to the size of the room, that there can be no objection to some portion of it being used as a freight room. But in such case, the carrier takes the risk, and it is his duty to so stow and secure such freight that the passengers will not be injured by it; nor can he require them to obey any arbitrary regulation with a view of diminishing such risk—for instance, to remain in their berths during the voyage or any unusual portion of it.

It is not satisfactorily shown what number of steerage passengers were on board the Oriflamme on this voyage. The steerage steward says he *thinks* there were 60 or 70 of them. Nor is there any evidence as to the size of the steerage-room.

But under any circumstances the stowing of this tin in the steerage, *in the manner in which it was done*, was gross negligence on the part of the respondent. It was the direct cause of the injury received by the libellant, without any fault or contributory negligence on her part. She had a perfect right to sit down by the side of the pile, unless she knew it was dangerous, or was duly warned to avoid it. But she was not so warned, nor can it be claimed under the circumstances, that she was aware or had good reason to know of the danger. Apparently it was the most convenient aud secure place in the room of which she could avail herself, to sit or lie down and be out of the way of the crowd, to whom she was a stranger.

The libellant claims $3,000 damages for the injuries received and expenses incurred on account of them.

For everything beyond the actual expense and loss of time incurred on account of the injury, the damages can only be estimated in a general way. In making this estimate regard must be had to the condition in life and the circumstances of the parties. Hanson v. Fowle, 1 Saw. 545. The respondent is a corporation, engaged in transporting passengers and freight between this port and San Francisco. It is the owner of the steamship Oriflamme, but of what other property, if any, does not appear. The libellant, as has been stated, is a servant girl, an immigrant from Germany, and about 19 years of age.

I find that she is entitled to recover for expenses of her sickness and injury to her clothing, $100; for the loss of time and labor on account of the injury, $100; for the expense of employing counsel to maintain this suit to recover the damages to which she is entitled, $300; for the physical and mental pain and suffering caused by the injury and treatment of the libellant while on board the vessel after the accident, $1,000; and, for the permanent disfigurement of the libellant's face from the wound on the forehead, $500. It may be that the sum of $500 is an insufficient compensation for such a blemish upon the personal appearance of the libellant. But it does not appear that the scar will affect her personal appearance, so as to make her presence offensive or painful to others. For this reason it is not likely to interfere with or prevent her from obtaining employment in her calling and sphere of life. It will in no way affect her ability to labor and earn her living In manners and appearance, she is a plain girl, moving in an humble walk in life, and not like many others, dependent upon her beauty for her dowry or as a means of support.

Still the scar will be a permanent disfigurement of her person, for which she is entitled to some compensation. Karr v. Parks, 44 Cal. 49. In this country, at least, it is still open to every woman, however poor or humble, to obtain a secure and independent position in the community by marriage. In that matter, which is said to be the chief end of her existence, personal appearance, comeliness, is a consideration of comparative importance in the case of every daughter of Eve.

Let a decree be entered for the libellant for the sum of $2,000 in lawful currency of the United States, and the costs of suit.

Federal Court Practice—Act of June 1, 1872—Real Party in Interest.

WEED SEWING MACHINE Co. v. S. TAYLOR WICKS, *et al.*

United States Circuit Court, Western District of Missouri, April Term, 1875.

Before Hon. JOHN F. DILLON, Circuit Judge, and Hon. ARNOLD KREKEL, District Judge.

1. **Rules of Practice in State Courts, how far applicable in Federal Courts.**—Since the act of Congress, of June 1, 1872 (17 Statutes at Large 197, sec. 5), the provisions of state statutes, as to pleading and practice in purely legal actions, are in the main applicable to such actions in the Circuit Court of the United States.

2. ——. **Real Party in Interest.**—Where the state law directs, or authorizes all suits to be brought in the name of the *real party in interest*, this will, in the absence of some special statute of Congress, give the like party the right to sue in actions at law in the federal courts sitting in such state.

On demurrer to the petition. The plaintiff is the Weed Sewing Machine Company, which the petition alleges to be created by the laws of the state of Connecticut, and a citizen thereof. The petition states that the defendants are citizens of Missouri and residents in the western district thereof.

The petition counts upon a bond executed by the defendants, as follows:

"Know all men by these presents, that we, S. Taylor Wicks, John S. Tyler and John W. Lisenly of Springfield, county of Greene, and state of Missouri, are held and firmly bound to F. S. Bartram of the city of St. Louis, and state of Missouri, agent Weed Sewing Machine Company, of Hartford Conn., in the penal sum of one thousand five hundred dollars, to be paid the said F. S. Bartram, agent, or *his* attorney, executor, administrator or assignee. For which said payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, and every one of them, by these presents. Sealed with our seals, and dated this 1st day of July, 1871. The condition of the above obligation is such, that whereas, S. Taylor Wicks and John S. Tyler of said Springfield, Mo., as aforesaid, intend to carry on the trade or business of dealing in the sewing machines manufactured by the Weed Sewing Machine Company, of Hartford, Conn., at said Springfield, for which said sewing machines the said F. S. Bartram is general agent, and whereas, the said Wicks and Tyler have applied to the said F. S. Bartram, agent, to supply them with goods in the way of their trade, which he, as agent of said company, has agreed to do upon condition that the said Wicks and Tyler enter into a bond in the penalty above mentioned, upon the terms hereinafter expressed. Now if the said Wicks and Tyler, their heirs, executors or administrators, shall, from time to time, and at all times hereafter, *pay* or cause *to be paid unto the said F. S. Bartram, agent of said company, his* executors, administrators or assigns, all and every such sum or sums of money as shall at any time or times hereafter become due and owing *to* the said *F. S. Bartram, agent as aforesaid*, for goods sold or furnished by him to the said Wicks and Tyler or sent or delivered on their order at the time said sum or sums shall respectively become due and payable; or if the said Wicks and Tyler, their executors or administrators, shall, at any time or times, hereafter make default in the payment of such sum or sums when due and payable, but shall well and truly pay the same within thirty days from the day a written notice of said default and failure to make payment, as aforesaid, shall be deposited in the post office at St. Louis by said F. S. Bartram, agent, addressed to the said Wicks, Tyler or Lis-

enly, at Springfield, Mo., aforesaid, or within thirty days from the time personal notice of said default and failure to make payment is given said Wicks, Tyler or Lisenly by said F. S. Bartram, agent; then, in any of said cases, the above written bond and obligation shall be void and of no effect; otherwise shall remain in full force and virtue.

"In testimony whereof we have hereto affixed our hands and seals this first day of July, A. D. 1871."

S. T. WICKS. (SEAL.)
JOHN S. TYLER. (SEAL.)
JOHN W. LISENLY. (SEAL.)

The petition alleges that the plaintiffs, at the request of the defendant, supplied the latter, under the said contract or bond, with machines at the prices stated in an account thereof annexed to the petition, and that the defendants, though requested, have failed to pay the amount due the plaintiffs therefor.

It is also alleged that the plaintiffs are the sole and real parties in interest in the bond declared on, and that the plaintiff's agent, the said Bartram, never had any interest therein.

The code of Missouri contains this provision: "Every action shall be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust * * may sue in his name without joining with him the person for whose benefit the suit is prosecuted; and a trustee of an express trust includes a person with whom, or in whose name, a contract is made for the benefit of another." Wagner's Statutes, p. 999, secs. 2, 3.

The demurrer to the petition rests upon the following grounds:

1st. The action upon this bond can only be brought in the name of F. S. Bartram, the obligee therein named.

2d. If it can be brought in the name of the plaintiff (the Weed Sewing Machine Company) the petition, in order to give this court jurisdiction, shall show that Bartram was a citizen of some state other than Missouri, and so could himself have maintained an action thereon.

Ewing & Smith, Bray & Kenton, for the plaintiff; *Edwards & Son*, for the defendants.

DILLON, Circuit Judge.—I am inclined to the view that Bartram, and not the corporate plaintiff, his principal, is the obligee in the bond, and for the purposes of this demurrer will concede such to be the case. The result of this concession is that by the principles of the common law, an action for the breach of the condition of the bond, which is under seal, could be brought only in the name of Bartram, although his principal might alone be interested in the recovery.

It must also be conceded that under the federal constitution and legislation, the distinction between law and equity, and the corresponding remedies, is established, and remains in full force unaffected by the practice act of June 1, 1872. Robinson v. Campbell, 3 Wheat. 212; Bennett v. Butterworth, 11 How 674; Thompson v. Railroad Companies, 6 Wall. 134. Indeed that enactment not only recognizes, but proceeds upon the distinction.

It is also undoubtedly true, that under the provisions of the Missouri code in respect to parties, quoted in the statement of the case, an action like the present *might* be brought in the proper court by Bartram *in his own name*, although his principal would alone be interested in the recovery. But it is equally true (under the averment made in the petition to the effect that the sewing machine company is the sole and real party in interest and supplied the consideration for the debt sought to be enforced) that under the provision of the Missouri code the action, if brought in the state court might be maintained by the sewing machine company in its own name. Wagner's Stats., p. 999, secs. 2, 3, and notes of cases.

The present action being one at law, the mode of pleading and procedure prescribed by the state statute, is applicable to it, and the suit is well brought under the averments of the petition, in the name of the plaintiff as the real party in interest. This principle was distinctly decided by the supreme court prior to the act of 1872, in respect to cases removed from the state to the federal court. Thompson v. Railroad Companies, 6 Wall. 134. In the case cited, Mr. Justice Davis remarks: "The law of Ohio directs that all suits be brought in name of the real party in interest. This constitutes a title to sue, when the suit is brought in the state court in conformity with it." Since the act of 1872, at all events, in a purely legal action the real party in interest has a right to sue in the federal courts, if the case is one which is otherwise within the jurisdiction of those courts, and there is no special statute of Congress making a different provision.

If this view is correct, then this suit is well brought in the name of the plaintiffs, and this is decisive of the question made by the defendants; for it is well settled that it is the citizenship of the parties to the record that governs in determining the jurisdiction of the circuit court, not of persons interested in the controversy, but who are not parties. Irvine v. Lowry, 14 Pet. 293; Bonnafee v. Williams, 3 How. 574; Osborn v. Bank of United States, 9 Wheat. 856; Davis v. Gray, 16 Wall. 203, 220; Coal Co. v. Blatchford, 11 Wall. 172.

As the petition shows that the plaintiffs alone furnished the consideration for the debt or claim sought to be enforced, and that the agent, Bartram, had no interest therein, if the promise of the defendants, though made in form to Bartram, had not been contained in an instrument under seal, there is a line of strong adjudications which hold that the plaintiffs might sue to enforce the promise without the aid of any statute. It is, however, unnecessary to consider the case in this view, as the state statute gives the plaintiffs the right, and the act of Congress of June, 1872, makes the right equally available to them in the federal court.

They are not the assignees of Bartram, and hence it is not necessary that the petition should show that Bartram's citizenship is such that he could have maintained the action if no assignment had been made.

KREKEL, J., concurs.

JUDGMENT ACCORDINGLY.

Natural Stream—Diversion—Proprietary Rights in Water.

HOLKER v. PORRITT AND OTHERS.*

English Court of Exchequer Chamber, February 8, 1875.

Where, from time immemorial, part of the water of a natural stream has been diverted for the exclusive use of certain land, the owner of the land has proprietary rights in the water so as to give him a right of action for an obstruction of the stream; and he may devote the water to any purpose he thinks fit, without derogating from this right

This was a special case stated on appeal against the discharge by the Court of Exchequer of a rule to enter a verdict for the defendants. The case is reported in the court below in 21 W. R. 414. The question left for the opinion of the court of appeal was whether the plaintiff was entitled to the flow of certain water claimed in the declaration, and had a right to maintain an action for obstructing the flow against the defendants.

The stream in question took its rise in the land of the defendants and flowed in one course to a certain point near a farm called "Edge Farm," marked E. on the plans annexed to the special case, where it was divided into two streams by a stone or "fedder." One of these streams flowed into the Buckden Brook, and the other flowed to the plaintiff's paper mill, a distance of about half a mile. This latter stream originally flowed into a watering trough, the overflow of which was diffused over the land, and discharged itself by percolation. The stream had existed in this state from time immemorial, but in 1846 or 1847, one Oliver Walker, who at that time was copyholder of all the land from the point E. to the

*From the report in 23 Weekly Reporter, 409.

plaintiff's paper mill, constructed certain reservoirs for the storage of the water for the use of the mill, and also an underground stone drain from the trough to the reservoirs for the purpose of carrying the overflow of the water from the trough to the reservoirs. In 1867 the mill was surrendered to the plaintiff, together with the full use and enjoyment of all springs and streams of water on the land of Walker. The grievance complained of as the subject of the action was an obstruction by the defendants of the flow of water near the springs.

Herschell, Q. C. (*Pope, Q. C.*, and *Baylis* with him), argued for the appellants, who were the defendants in the action.

The Solicitor-General (*Sir J. Holker, Q. C.*) (*Kemplay, Q. C.*, and *Gorst* with him), argued for the respondents.

The arguments used are noticed in the judgment of the court, but it will be seen that the decision went on a different ground.

The judgment of the court* was delivered by

LUSH, J. [after stating the facts].—Upon the hearing before us at the sittings after the last term, two questions were principally argued: first, whether the conveyance of the surplus water, by means of the drain, from the watering trough to the mill, is to be considered as a prolongation of the stream entitling the mill owner to the ordinary riparian rights there; and secondly, if not, whether by the enjoyment without interruption for more than twenty years, first by Walker, and afterwards by the plaintiff, the latter had acquired a right to the water as an easement by virtue of the Prescription Act.

Upon consideration of the peculiar facts of this case we think that the plaintiff's title rests on a broader ground, and that he need not resort either to the theory of an extension of the stream or to the Prescription Act.

It must be taken upon the facts stated, that the owner of Edge Farm had a prescriptive right to the maintenance of the stone or feather at the point E., and of the diversion by means of it of part of the stream to, and for the exclusive use of, the farm. The water which came down to him at the farm was his own, to use as he pleased. There was no one entitled to share with him in its use, and no one who could call him to account for any use which he chose to make of it there. In this respect his position was different from that of a riparian owner, who only shares the use of the water in common with other riparian owners.

In collecting the overflow at the trough and conveying it to the mill he clearly did nothing in derogation of the rights of any other person, or which he was not entitled to do in the lawful use and enjoyment of his own property. Nor did he thereby lose any right he theretofore had. While the water overflowed the trough and ran to waste he had a right to complain of any undue diversion or obstruction of the stream which diminished the accustomed supply to the trough, and he acquired no greater right by conveying it to the mill.

No doubt the consequences to a wrong-doer became more serious after the drain was made than it was before, because the wrongful act was more injurious, and larger damages would have to be paid for it; but it is a fallacy to say that a man's rights are abridged if, when he abuses them, he has to make larger compensation. It is the necessary effect of every appropriation of running water to a new and more beneficial use, that a wrongful diversion or obstruction entails a larger measure of liability. It is established by many authorities which are collected in and confirmed by Mason v. Hill, 5 B. & Ad. 1, that as soon as the owner of land on a stream has appropriated the water to a beneficial use he may sue for the injury done to him in respect of such new use. In that case the proprietor, having appropriated the stream to the use of a mill newly erected, was held entitled to recover from a proprietor higher up the stream for the injury to his mill, occasioned by the wrougful diversion of the stream, although before the mill was built the wrong-doer would only have been liable to nominal damages.

If, therefore, Walker had been in possession of the mill in question, it is clear to us that he could have brought this action, not because he happened to be at the same time riparian owner higher up than the mill, and also owner of the mill, but simply as owner of the mill. And there is no conceivable reason why the plaintiff should not have the same right, inasmuch as he is surrenderee of the mill with all the water rights annexed and appurtenant to it. Walker has chosen to create a servitude on his own land, but none has been created, or attempted to be created, on the lands or riparian rights of the defendants.

None of the authorities cited conflict in the least degree with his view. In the case of Stockport Waterworks Company v. Potter, 3 H. & C. 300, 12 W. R. C. L. Dig. 119, the water was taken directly from the stream, in the regular flow of which the proprietors below had an interest, and it is clear that such a use of the water could only grow into a right by twenty years' enjoyment. Whether that case was rightly decided or not, whether the grounds upon which the majority decided can be maintained, or whether it is distinguishable from Nuttall v. Bracewell, L. R 2 Ex. 8, 15 W. R. C. L. Dig. 125, we need not now consider.

The present case stands clear both of the difficulty and the reasoning in that case, and we have no hesitation in holding, for the reasons we have given, that the judgment of the court below ought to be affirmed.

JUDGMENT AFFIRMED.

Attorneys for the plaintiffs, *Milne, Riddle & Mellor.*

Attorneys for the defendants, *Clarke, Woodcock*, and *Rylands.*

* Lord Coleridge, C. J., Keating, Quain, Lush, and Archibald, JJ.

Partnership—Limitations—Chancery Practice—Action of Account.

SARAH W. BOLTON, EXECUTRIX, ETC., v. THOMAS DICKENS, *ET AL.*

First Chancery Court of Shelby County, Tennessee, June 11, 1875.

Before Hon. R. J. MORGAN, Chancellor.

1. **Partnership—Statute of Limitations.**— The limitation of three years prescribed by the act of 1715, for the action of *account render*, furnishes the rule which governs the chancery courts in the application of the statute, to a bill filed for the settlement of partnership accounts by one partner against his copartners, in cases arising before the code of 1858.

2. ——, ——. If a remedy in equity is concurrent with some remedy at law, the same limitation prescribed for the legal, will bar the same equitable remedy in all cases. But, if the remedy in equity is exclusive, the court applies the limitation prescribed for *analagous* actions at law.

3. ——, ——. **Exceptions in favor of Merchant's Accounts.**— This exception contained in the act of 1715, and the English statute of James, does not apply to accounts between partners *inter sese*.

4. ——, ——. **Trusts.**—The recognized equitable exception of favor of express trusts, does not apply to settlements between partners of their partnership accounts.

5. **Partnership — Action of Account.**— No other action but that of *account render* will lie at law for a settlement of partnership accounts, until after a settlement and promise to pay. The action is not abolished in Tennessee, though disused.

6. **Equity Practice—Effect of overruled Demurrer.**—The statute of limitations may be set up by plea, and answered and relied on at the hearing, although same defence had been made by demurrer, which was overruled, and the court will again try the question on its merits.

Since 1840 a partnership in the business of slave-dealing has existed between Isaac L. Bolton, Wade H. Bolton and Thomas Dickens, and in 1855, Washington Bolton became a partner; the firm continued to do that business and also the business of dealing in cotton for speculation. The business was immense, running through transactions amounting in the aggregate to several millions of dollars. The partnership expired by limitation on the 1st day of June, 1857. Washington Bolton died in Febreary, 1862; Isaac L. Bolton died in November, 1864; and June 10th, 1868, the executrix of Washington Bolton filed this bill

against the surviving partners and their representatives, alleging that the partnership was unsettled; that it had made enormous profits; and that Wade H and Isaac L. Bolton held the assets and property of the concern. It prayed an account and settlement. Dickens admitted the bill, and also demanded a settlement. Wade H. Bolton demurred, and relied on the statute of limitations of three and six years, and on the equitable defence of stale demand, and this demurrer was overruled, and he answered setting up the same and other defences. Isaac L. Bolton's representatives made the same defences by answer.

These are chiefly the facts pertinent to this decision.

For plaintiff, *Luke W. Finlay;* for Dickens' estate, *Gantt & McDowell, Patterson & Lowe;* for Wade H. Bolton's estate, *H. T. Ellett, E. L. Belcher, D. E. Meyers;* for Isaac L. Bolton's estate, *Randolph, Hammond & Jordan.*

MORGAN, Chancellor.—This bill was filed June 10th, 1868. Partnership expired June 1, 1857. Three years ended June 1, 1860. Wash. Bolton died February, 1862, the first partner that died. At the time of his death the courts were opened.

It is well settled that the statute of limitations, may be pleaded in chancery in all cases when an action at law will lie for the same cause. When there is concurrent jurisdiction, the statute is a good defence in either court.

If there be an action at law not barred, the remedy in equity will not be barred.

One partner can not sue another partner in any action in form *ex contractu*, but must proceed by action of account or by bill in equity.

The action of account lies between partners at common law; so also has equity jurisdiction.

Mr. Chancellor Kent, in one of his decisions, expresses some surprise that the action is not more often resorted to in the law; courts.

The action of account has never been abolished in this state; although it is disused. The limitation is expressly recognized and fixed at three years, by the act of 1715. In 1st Yerg. 312, the supreme court says that equity has concurrent jurisdiction with courts of law in cases of account.

No other action at law will lie by one partner against another, except after settlement and promise to pay. If this be true, the three years will apply to actions for account between partners at law, and of consequence the same limitation must apply in equity.

This limitation was in force in Tennessee when this right of action accrued.

The exception in the statute of accounts, between merchants and merchants, does not apply to accounts of partners *inter sese*, but it is only applicable between different parties, their factors or servants, originating in current and mutual accounts, and for articles of merchandise.

If it were admitted that an action could be maintained at law, by the disuse of the remedy of account, and that jurisdiction of the settlement of accounts was exclusive in equity, it would not alter the case, for the same limitations apply in courts of equity to equitable rights and remedies that exist in analogous cases at law, and the analogous case at law would be that of account.

The only exception to this principle will be found in cases of express trust; account between partners does not stand upon that ground after dissolution, but upon other equitable considerations.

The bill in this case contains no averment, nor does the proof show any fact to take the case out of the statute of limitations. There is no suggestion of any trust, or the allegation and proof of any new promise. All the partners were alive when the three years expired.

But even if the doctrine of acknowledgment of indebtedness could be applied, and the bill contained proper averments, the proof must show unqualified and direct admission of indebtedness and willingness to pay, which it does not. An expression of a willingness to account either *in pais* or in an answer, will not avoid the plea of statute of limitations.

Receiving property of the firm or subsequent payment of debts by one partner, will not avoid the statute.

These defences may be set up in the answer, although overruled in the demurrer. If the court should find upon final hearing, that the plea of limitation should have been allowed upon demurrer, it will decide the question at final hearing.

I think it makes no difference as to the-cross bill. It was our mode of defence, but the cross-bill was never acted upon, and could at most only apply to W. H Bolton, as I. L. Bolton made no such defence.

The bill will be dismissed with costs.

BILL DISMISSED.

Fire Insurance—Condition in Policy against Premises becoming Vacant.

ANN KELLY v. THE HOME INSURANCE COMPANY OF N. Y.

U. S. Circuit Court, District of Kansas, June Term, 1875.

Before Hon. C. G. FOSTER, District Judge.

A policy of fire insurance contained the following provision: "If the above mentioned premises shall become vacant or unoccupied, and so remain with the knowledge of the assured, * * * without notice to, and consent of this company in writing, * * * this policy shall be void." At the time of the fire the premises had been unoccupied about thirty-three days, with the knowledge of the assured, but without notice to, or consent of, the insurance company. They were not, however, abandoned, but the plaintiff was all the time endeavoring to procure a tenant for the house. *Held*, that the plaintiff was entitled to recover; that the condition in the policy contemplated only an abandonment of the premises in consequence of their becoming untenantable, or a vacation of them for an *unreasonable* length of time, and not a mere temporary vacancy, such as would occur while one tenant was moving out and another moving in.

Action for $1,500 and interest on an insurance policy. Trial and judgment for the plaintiff. Motion for new trial.

Horton and *Waggener* for the plaintiff; *Pratt, Ferry* and *Brumback*, for the defendant.

FOSTER, J.—The motion of the defendant for a new trial depends upon the construction of this condition in the policy: * * "If the above mentioned premises shall become vacant or unoccupied, and so remain with the knowledge of the assured * * * without notice to and consent of this company in writing * * * this policy shall be void."

At the time of the fire the premises had been vacated by the tenant, and had been unoccupied about thirty-three days with the knowledge of the assured, and without notice to, or consent of the insurance company. During that time the premises were not abandoned, but the plaintiff was all the time endeavoring to obtain a tenant for the house.

On this state of facts the court on the trial instructed the jury that the plaintiff was entitled to recover.

The condition in the policy is a peculiar one, and its meaning is somewhat obscure. Just what meaning was intended to be conveyed by the words "*and so remain*" is not apparent, but it is certain that they qualify the condition, and make it something more than a mere temporary vacancy, such as would occur while one tenant is moving out and another moving in. The vacancy, or want of an occupant of itself, however brief, is not enough to avoid the policy, but the vacancy must *remain so*. Remain so how long? The condition may admit of either one of two conditions, viz: Either an abandonment of the premises as tenantable property. Or the vacancy must have remained and continued an unreasonable time. Now this proviso is inserted in the policy by the defendant company, and for its benefit, and is printed in very small type.

In the case of Ins. Co. v. Slaughter, 12 Wall. 404, the court, among other things, says: "They (the Ins. Co.) should set

forth these restrictions in terms which can not admit of controversy, andshould print these restriction clauses in type large enough to arrest the attention of the assured."

When there is doubt in the condition restricting the liability of the company, the construction should be adopted most beneficial to the *promisee*. 32. N. Y. 405, and cases cited.

Now, in this case, which ever construction we adopt in interpreting this policy, I can not see that the company can avoid its liability. If it contemplates an abandonment of the premises, this is not such a case, for there was no abandonment. If its liability was to terminate on the vacancy continuing an *unreasonable* length of time, then under the circumstances I could not hold that an unreasonable time had transpired. It appeared from the evidence that the plaintiff was all the time trying to get a tenant for the premises, and was in constant expectation of obtaining one. If the company desired to limit the time of its liability to thirty days, it was very easy for them to have expressed it in plain and unmistakable language.

The cases referred to by counsel for the defendant do not help us in this case. In 6 Allen 231, the condition was as follows: "The policy becomes void when the occupant personally vacates the premises, unless *immediate* notice be given to this company and *additional premium paid*." In 10 Allen, 228, it provided: "If the building insured remains unoccupied over *thirty* days without notice, this policy shall be void." In 15 Wis. 138 (151) it read: "Houses, barns or other buildings insured as occupied premises, the policy becomes void when the occupant personally vacates the premises, unless *immediate* notice be given to this Co. and *additional premiums paid*." In the case last cited, the premises had been vacated for *seven months* without notice to the company.

I am of the opinion that my construction, as to the liability of the defendant under the policy and facts proved was not erroneous, and must therefore overrule this motion for a new trial.

So Ordered.

Foreign Selections.

Gift—Resulting Trust—A Hint to Judges who write long Opinions.—We have often observed that with judges generally, and more especially perhaps, with the learned judge whom we are about to criticize, the soundness of the law laid down is frequently in inverse proportion to the length of the decision, we presume, because when a paradoxical conclusion is arrived at, a large amount of sophistical reasoning is needed to justify it. The prolix judgment of Lord Justice James in Fowkes v. Pascoe, 32 L. T. Rep. N. S. 545, is an instance in point. A widow, Sarah Baker, at several periods between 1843 and 1850, purchased stock in the joint names of herself and of J. I. Pascoe, the son by a second marriage of Mrs. Baker's daughter-in-law. She transferred other sums of stock into the same names. She died in 1850, having appointed Pascoe and Thompson executors and trustees of her will. The bill was filed by parties interested in the will, praying for a declaration that the sums of stock so purchased or transferred, belonging to the estate of the testatrix. The defendant adduced evidence that he had been treated by the testatrix as her son; and that her intention was that he should have the stock, and former servants of the testatrix deposed that she frequently spoke of him as her adopted son. The master of the rolls held that the evidence of the defendant and his wife could not be received; and that the mere depositions of the former servants could not be taken as proving that the testatrix intended to place herself *in loco parentis* to the defendant. And proof of quasi-parentage failing, the judge of the court below very properly, as we hold, declared that the equitable doctrine of resulting trust must prevail. The master of the rolls treated the claims of the defendant as entirely depending upon his proving the quasi-parental relationship. And his view of the case is supported by the authorities, notably by the well known case of Powys v. Mansfield, 3 My. & Cr. 359. If the Lords Justices had merely decided that the testatrix had adopted the defendant, we should not have so much fault to find with the decision, as such a question is purely one of evidence upon the facts. But it is distinctly stated by Lord Justice James, that no such adoption took place. But he accepted the evidence of the defendant and his wife, as proof positive that the testatrix intended a gift, and not a trust. Now, no previous case has gone nearly so far as this. Joint-purchases, or investments in the name of a nephew alone (Currant v. Jago, 1 Col. 261), or a joint-purchase by father and son, where the father pays the price (Dyer v. Dyer, 2 Cox, 92), have been held advancements, and similar cases have arisen between husbands and wives, and fathers and daughters. But no case was cited in argument, nor do we believe that one exists, in which a joint-investment in the names of a testator and a stranger has, on the sole evidence of the parties interested, been held to be a gift, and not a resulting trust. And in most of the cases turning upon the question whether a person has placed himself in *loco parentis*, letters and other documentary evidence have been adduced. The decision is all the more extraordinary, as the Lord Justice himself said most explicitly in Hill v. Wilson, L. Rep 8 Ch. 888, that the evidence of a plaintiff on his own behalf, as to a bargain with a man since dead, ought, in the absence of a corroboration, to be disregarded. The same remark applies certainly to a man's wife. The case was all the harder, as it being decided that no quasi-parental relationship existed, the sums of stock were not deemed advancements in ademption of other benefits conferred by the will. We have little doubt that the judgment of the master of the rolls would be affirmed, and that of the Lords Justices reversed, in the court of final appeal.—[*The Law Times*.

Negotiable Instruments—There is no part of our law relating to commerce that is of more importance than that which decides what are and what are not negotiable instruments. From one point of view this is a question of fact, rather than of law, the answer depending in many cases upon the custom of merchants; and it is highly desirable that questions such as these should be kept distinct from all that is arbitrary or technical, as far as that may be possible, and considered rather with reference to what is convenient in practice and reasonable in principle. It is not of itself sufficient to make an instrument legally negotiable that it is transferable by established custom. The custom of merchants (unless part of the ancient law merchant), with all the weight that has been given to it for the benefit of commerce, can not confer upon the holder of an instrument the right to sue upon it, unless the instrument is one, the legal right to sue on which passes by delivery, or because the parties are not themselves competent to introduce such an incident by express stipulation. And negotiable instruments must be of this last class. In order, therefore, to ascertain whether an instrument is negotiable, the question of fact must always be enquired into. Is it, by the usage of trade transferable like cash? But there remains the equally essential question of law. Does the mere delivery of it confer upon any person receiving it *bona fide*, and for value, a good title to the property which it symbolizes?

Of what instruments this last question may be answered in the affirmative, was the point in the recent case of Goodwin v. Roberts and others, and though there could be little room for doubt as to what the judgment would be, the case was one of such immense importance in commercial circles, that it must have been with a feeling of relief that the judgment was heard in the city. The facts were as follows: The plaintiff purchased certain Russian and Austrian scrip in Feb., 1874, through one Clayton, who improperly pledged it to the defendants as security for a loan to himself. Clayton having been adjudicated a bankrupt, the defendants appropriated the proceeds of the scrip to the discharge of their advance to him; and the plaintiff then brought an action

against the defendants to recover the sum they had received for the scrip. In delivering judgment, Baron Bramwell said that the question whether foreign bonds were negotiable instruments had been decided in Gorgier v. Mieville, 3 B. & C. 45, and that decision had never been overruled. The remaining question was whether there was such a substantial distinction between bonds and scrip that the law that applied to the former did not apply to the latter. The case that had been relied upon by the plaintiff was Crouch v. The Credit Foncier of England, Limited, 29 L. T. Rep. N. S. 259, where it was held that an engagement to pay money to bearer, not entered into by a promissory note or bill of exchange, could not be rendered a negotiable instrument. But the argument that these scrips being merely engagements to give bonds, can not be made negotiable instruments, was founded upon the assumption, that the agents of the foreign governments for the negotiation of these loans in this country, took upon themselves some liability, which they clearly did not. It appeared to him shocking to common sense, that such scrip, which were in a manner *interim* bonds, should not be negotiable, while the bonds to which they related were negotiable. The case was governed by the decision in Gorgier v. Mieville, and the judgment of the court must be in favor of the defendant. Baron Cleasby concurred. From the above very brief summary of a most able judgment, it will be seen that these scrips are, as regards their negotiability, placed on exactly the same footing as bonds.

The leading case on this subject is Miller v. Race, Smith L. C. p. 479, 6th edit., in the notes to which the authorities are collected. It was held in that case, that property in a bank note passes like that in cash by delivery, and a party taking it *bona fide* and for value, is entitled to retain it as against a former owner, from whom it had been stolen. Lord Mansfield, in delivering judgment, gave the true reason why bank notes and cash are on the same footing after delivery. "It has been quaintly said that 'the reason why money can not be followed is, because it has no ear-mark,' but this is not true. The true reason is upon account of the currency of it, it can not be recovered after it has passed in currency. So in case of money stolen, the true owner can not recover it, after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration: but before money has passed in currency, an action may be brought for the money itself." So in Foster v. Green, 31 L. J. 158, Ex. "It is essential to the currency of money that property and possession should be inseparable." In Gorgier v. Mieville, *ubi sup.*, the case on the authority of which Goodwin v. Roberts and others was decided, the King of Prussia had given bonds whereby he declared himself and his successor bound to every person who should, for the time being, be the holder of the bonds, for the payment of the principal and interest in a certain manner, and it was held that the property in those instruments, passed by delivery as the property in bank notes (Miller v. Race, *ubi sup.*), exchequer bills (Brandao v. Barnett, 12 Cl. & Fin. 987) or bills of exchange, payable to bearer; and that consequently, an agent in whose hands such a bond was placed for a special purpose, might confer a good title by pledging it to a person who did not know that the party pledging it was not the real owner. See also Jones v. Peppercorn, 28 L. & J. 158, Ch. and Attorney-General v. Bouwens, 4 M. & W. 171. In this last case, the point as to negotiability arose upon the question whether the instrument was subject to probate duty; and it was held that probate duty is payable in respect of bonds of foreign governments, of which a testator dying in this country, was the holder at the time of his death, and which have come to the hands of his executors in this country, such bonds being marketable securities within this kingdom, saleable and transferable by delivery only, and it not being necessary to do any act out of this kingdom in order to render the transferrence of them valid. And in the case of Glyn v. Baker, 13 East, 509, where it was held that East India bonds were not negotiable instruments, the alarm created by the decision was so great that within a month an act (51 Geo. 3, c. 64) was passed, putting them on the same footing as cash and bank notes. In Byles on Bills (5th American edition, p. 281), it is said that in the state of Georgia it has been held that any bond payable to bearer is a negotiable instrument.

It only remains to notice the case that was relied upon by the plaintiff in Goodwin v. Robarts (viz., that of Crouch v. Credit Foncier of England, *ubi sup.*), but which was distinguished in Baron Bramwell's judgment. The facts of that case were as follows:—A debenture of a limited company, registered under the companies' act 1862, payable to bearer on a particular day in the year 1872, with interest in the meantime, but liable to be drawn and paid off before that time, was sold by the company to M., in May, 1869, and stolen from him in July of the same year. Plaintiff, at the end of the year 1871, purchased from one S. (who had since absconded) this debenture, which had been drawn in October, 1871, and demanded payment thereof from the company; but the company having received notice from M. of the debenture having been stolen from him, refused to pay it to the plaintiff, who brought an action against the company to recover the amount of it. At the trial it was admitted that similar documents had been treated as negotiable, it was also admitted that the plaintiff derived title from the thief, but the jury found that the plaintiff had given value for the debenture without notice, and it was held, first, that the contract contained in the conditions prevented the debenture from being a promissory note, even if it had been under hand only; secondly, that it was not competent to the defendants to attach the incident of negotiability to such instrument, contrary to the general law; and that the custom to treat them as negotiable, not being sufficiently ancient to be a part of the law merchant made no difference, as such a custom, though general, could not attach an incident to a contract contrary to the general law; and that the plaintiff, therefore, could not recover. Blackburn, J., in the course of his judgment, speaking of this debenture payable to bearer, said: "It is under seal, and therefore is *prima facie* a covenant, not a promise; and it is quite clear that a covenant to pay money is not negotiable, though a promissory note is." 3 & 4 Anne, c. 9. He goes on to consider whether the sealing by a corporation of a promise to pay, is only equivalent to their signing it, or is a covenanting to pay; and then says: "But it is not necessary to decide in the present case whether an instrument under the seal of a corporation can be a promissory note, for the contract of the Credit Foncier is not merely to pay the money, but also to cause a portion of the bonds to be drawn in the stipulated manner; and any one entitled to sue on the contract contained in this instrument, would be entitled to sue for damages, if the company did not fairly give him his chance of having his bond drawn according to the stipulated conditions. And it is obvious that such a contract as that can not be a promissory note." It is needless to say that there was no such contract in Goodwin v. Robarts. After alluding to the judgments in Attorney-General v. Bouwens, *ubi sup.*, and Gorgier v. Mieville, *ubi sup.*, he distinguishes them as follows: "We have no intention to throw the least doubt on these decisions, but we do not think them applicable to an English instrument made in England, and we express no opinion as to what might be the law as to the obligations made by subjects abroad, which, by the law of the country where they were made, are negotiable in that country."—[*The Law Times.*

—NON-RECOGNITION OF ATTORNEYS IN INDIAN BUREAU.—The commissioner of Indian affairs has issued a circular to Indian agents notifying them that by direction of the secretary of the Interior, no attorney or agent of the Indians will hereafter be recognized by the Indian bureau, unless the party proposing to act as agent or attorney for any Indian tribe shall have first submitted the matter in which he desires to act for the Indians, for the consideration of the department, and shall have received specific authority from the commissioner of Indian affairs, approved by the secretary of the interior.

Correspondence.

OSAGE MISSION, Kas, July 7, 1875.

EDITORS CENTRAL LAW JOURNAL:—The numerous western readers who draw inspiration from the JOURNAL have reason to congratulate themselves that the legislature of New York has not adopted an old Roman law in force 302 A. U. C, which prescribed "*fustuarium*" as the punishment for libel. This law provided. "*Si occentassit malum carmen, sive condidisset quod infamiam faxit flagitumque alteri, capital esto.*" If any one recite or compose words injurious to the reputation or honor of another, let him be beaten to death. The Roman poet Horace refers to this law in the celebrated epistle to Augustus Cæsar. Epistles, book 2, Ep. 1. Perhaps an attorney who can convince the Supreme Court of New York that it has jurisdiction over the state of Missouri, can wring this in as a part of the common law.

C. F. H.

Notes of Unpublished Cases.

THE RAILROAD LIEN LAW OF MISSOURI.

In the case of James M. Walker and others v. The Mississippi Valley and Western Railway Company and others, in the United States Circuit Court for the Eastern District of Missouri, Judges Dillon and Treat recently decided some important questions, involving a large sum of money, in a contest between lien claimants and bondholders. The complainants, as trustees under two mortgages given by the railroad company to secure its bonds, brought suit in equity to foreclose them, and, among others, made defendants certain parties who had performed work and labor, and furnished materials in the construction and improvement of the railroad, and who claimed liens upon the railroad property under the act of the General Assembly of Missouri, approved March 21st, 1873, entitled "An act to protect contractors, sub-contractors, and laborers in their claims against railroad companies or corporations, contractors or sub-contractors."

The first mortgage was executed March 12th, 1872. The second mortgage was executed May 28th, 1873. At the time of the execution of the first mortgage the M. V. & W. Ry. Company was only authorized to own and operate a railroad from West Quincy, Marion county, Missouri, to Keokuk, Iowa, and from Canton, Mo. (a point about equi-distant from West Quincy and Keokuk), westward to the Missouri river. In January, 1873, the Mississippi Valley & Western Railway Company and two other railway companies consolidated, pursuant to the laws of Missouri and Iowa. The consolidated company retained the name of the Mississippi Valley & Western Railway Company, and was authorized to own and operate a railroad, from St. Charles, Missouri, to Keokuk, Iowa, and from Canton, Missouri, westward to the Missouri river. The first mortgage, therefore, covered the railroad property from West Quincy to Keokuk, Iowa, and from Canton westward. The second mortgage, made by the consolidated company, covered the same property, and, in addition thereto, the property of the railroad from West Quincy to St. Charles, and was a first mortgage upon that part of the railroad and property between those points, and a second mortgage upon that part of the railroad between West Quincy and Keokuk and from Canton westward.

The bill charged that the liens of the defendants, if any, were inferior and prior to the liens of the mortgages.

The defendants filed separate answers, and after alleging that they had liens, and had taken all the steps required by the lien law to preserve and keep alive their liens, charged that their liens were prior and superior to the lien of the mortgage executed May 28th, 1873, and were, therefore, *the first liens* on all that part of the railroad and its property between West Quincy and St. Charles, Missouri.

Agreed statements of facts were filed between the complainants and the lien claimants, by which it was admitted that the lien claimants had complied with the statute in preserving and keeping alive their liens. It was also admitted by the agreed statements that the work and labor was done, and the materials furnished in the construction and improvement of the railroad after June 20th, 1873.

The second section of the lien law provides that the lien given by the law shall be prior to all mortgages or incumbrances placed upon the railroad and its property, *subsequent to the passage of this act.*

There is no section of the lien law which says expressly that the act shall take effect from and after its passage, or at any particular time.

The General Statutes of Missouri (sec. 4, chapter 5, 2d Wagner, p. 894) provide that "All acts of the General Assembly shall take effect at the end of ninety days after the passage thereof, unless a different time is therein appointed."

Two questions were presented and argued:

1. The constitutionality of the law as applied to mortgages upon the property where work and labor was done and materials furnished and made since the passage of the law.

2. When did the lien law take effect?

The complainants, representing the bondholders, contended that the lien law was unconstitutional so far as it gave priority over mortgages existing when the work and labor and furnishing of materials were begun.

The complainants also contended that the lien law had no force and effect, as to priority or otherwise, until the expiration of ninety days from its approval, namely, until June 19th, 1873. The lien claimants contended, that the law was constitutional, and that the phrase "passage of this act," as used in the second section of the lien act, meant the approval of the governor, namely, March 21st, 1873, and that the lien, whenever acquired, was prior to all mortgages or incumbrances subsequent to that time.

Judge DILLON delivered the opinion of the court, orally.

The court held, 1, that it was competent for the legislature, and within the legitimate scope of legislative power, to provide in the act, entitled "An act to protect contractors, sub-contractors and laborers in their claims against railroad companies or corporations, contractors or sub-contractors," approved March 21st, 1873 (Session Acts, 1873, page 58), that the lien given by the act should be prior to all mortgages or incumbrances placed upon the railroad property subsequent to the passage of the act. There is no constitutional objection to such a provision. Phillips on Mechanics' Lien, sec. 30, pages 46, 47; Stonewall Jackson Association v. McGruder, 43 Geo. 9; Hildebrand's Appeal, 39 Penn. St. 133; Blauvelt v. Woodworth, 31 New York, 285; Hicks v. Murray, 43 Cal. 515; Davis v. Bilsland, 18 Wallace, 659. 2. The lien given by the lien act is prior to all mortgages or incumbrances placed upon the railroad and its property subsequent to March 21st, 1873, the date of the approval of the law. The phrase "subsequent to the passage of this act," and in the second section of the act, means subsequent to the approval by the governor.

And a mortgage lien placed upon the railroad and its property between the date of the approval of the act, to-wit:—March 21st, 1873, and June 19th, 1873, the end of ninety days after the approval, is subordinate and inferior to the lien of the contractor, laborer or material-man acquired under the lien act. As to the meaning of the phrase "passage of an act," see In *re* John C. Tibbetts (opinion of Judge Story), 5 Law Reporter, 267; Johnson v. Fay, 16 Gray, 144. And as to when an act is passed, Logan v. State 3 Heiskell (Tenn.), 442; Wartman v. City of Philadelphia, 33 Penn. St. 202; People v. Clark, 1 Cal. 406; Brainard v. Bushnell, 11 Conn. 17; *In re* Richardson, 2 Story's Rep. 580.

Davis, Throughman & Warren, and *G. Edmunds, Jr.*, represented the complainants; and *Theo. Bruer, Dryden & Dryden*, and *James Hagerman*, the lien complainants.

Abstracts of Opinions of the Supreme Court of the United States.

[Prepared expressly for this journal, by HENRY A. CHANEY, Esq., of Detroit, Mich.]

Common Carrier's Liability Limited by Contract.—Southern Express Co. v. Caldwell. Opinion by Strong, J. The company was sued for failure to deliver at New Orleans a package, received by them April 23, 1862, at Jackson, Tennessee. They had stipulated, when they received it, that they should not be held for its loss or any damage to it, unless claim should be made within 90 days from delivery to them. Claim was not made until 1868. 1. The responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable and not inconsistent with sound public policy. York Co. v. Central R. R. Co., 3 Wall. 107. 2. A common carrier is always responsible for his negligence, no matter what his stipulations may be. Railroad Co. v. Lockwood, 17 Wall. 387. 3. An express stipulation made between a common carrier and its employer that the carrier should not be held liable for any loss of, or damage to the property carried, unless claim should be made within 90 days from its delivery to the carrier, held reasonable, and not against the policy of the law. Lewis v. Gt. Western Ry. Co., 5 Hurl. & Norm. Exch. 867. It leaves the plaintiff at liberty to sue at any time within the period fixed by the statute of limitations, and relieves the defendants from no part of the obligations of a common carrier. It only requires that the shipper should, by asserting his claim, give reasonable notice of the loss so that the carrier, on whom it falls to trace out the goods, may ascertain the facts. See analogous decisions in Riddlesberger v. Hartford Ins. Co., 7 Wall, 386, re-

lating to a claim for the loss by fire, of insured property; Wolf v. Western Union Telegraph Co., 62 Penn. St. 83; Young v. W. U. Tel. Co., 34 N. Y. 390, as to claims for damages against a telegraph company. The ruling is very important and the question is fully considered in the opinion.

Captured and Abandoned Property Act—Right of Recovery under it.—Haycraft v. United States; Lane v. United States, opinion by Waite, Ch. J. A leading opinion on the right to recover the proceeds of captured cotton sold by the government. 1. The act for the seizure and sale of captured and abandoned property, found in rebel territory concerned only such private property of the enemy as was abandoned by its owner, or like cotton was liable to capture for the benefit of the enemy. Acc Mrs. Alexander's Cotton, 2 Wall. 419; Paddleford's case, 9 Wall. 540; Klein's case, 13 Wall. 136; Mrs. Anderson's case, 9 Wall. 67; Zellner's case, 9 Wall. 248. 2. Persons who gave aid and comfort to the late rebellion, can not, after two years from its suppression, receive the proceeds obtained by the United States from the sale of their property under the act authorizing the sale of captured and abandoned property. 12 Stat., 820. 3. Where the same statute creates a right and the remedy for enforcing it, the remedy provided is exclusive of all others.

Navigation—Liability of Vessel-Owners—Collisions—Inevitable Accident—Damages.—Steward v. Teutonia, opinion by Clifford, J. At between ten and eleven o'clock on a dark and foggy night, the steamship Teutonia and the river steamer A. G. Brown collided in the Mississippi river, to the destruction of the latter vessel with its cargo. They had exchanged warning signals, but had become confused, and evidence indicates that some of the signals received no reply. Instead of remaining stationary until they could ascertain each other's position, they were both under head-way when the collision took place. 1. Persons engaged in navigation are bound to provide suitable vessels; the vessel owners appoint the master and crew, and are responsible for their care and skill. When a collision happens from the unfitness of the colliding vessel for the voyage, or from the negligence or want of care and skill of those entrusted with her navigation, the fault is imputed to the owners, and the vessel is liable for the consequences. 2. "Inevitable accident" in the case of a collision, is where both parties have endeavored by all means in their power, with due care and a proper display of nautical skill, to prevent its occurrence, or it may result from darkness of the night, if it clearly appears that both parties were without fault from the time the necessity for precaution began, to the moment when every opportunity to avoid the danger ceased. 3. If a collision ensues in consequence of delay in taking precautions, it is no defence to allege and prove that nothing could be done at the moment to prevent the disaster, or that the necessity for precautionary measures was not perceived until it was too late to render them availing. 4. Where colliding vessels are both in fault, damages are divided between them.

Surety's Liability on Appeal—Mandamus—Practice as to Appeals.—*Ex parte* Sawyer *et al.*, opinion by Waite, Ch J. 1. An appeal from a decree does not involve those who stand simply as sureties on appeal, in the liability of the principal respondents. 2. Mandamus lies to compel a court to act, as *e. g.*, to execute a decree, but the court is supreme within its own jurisdiction while acting. 3. A provisional order can not be appealed from because it is not final. 4. A decision that execution shall not issue, can be reviewed on error or appeal only, and not on an application for mandamus.

Recent Reports.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF JUDICATURE OF THE STATE OF INDIANA. By JAMES B. BLACK, Official Reporter. Vol. 47. Containing cases decided at the May term, 1874, not published in vol. 45 and vol. 46, and cases decided at the November term 1874. Indianapolis: Journal Company, Printers and Binders. 1875.

We are indebted to the courtesy of the able reporter, Mr. Black, for this handsome volume, one of the best of this most excellent series, the appearance of which does credit to both publishers and reporter. The tables of cases reported and cited; the index and the general arrangement—particularly in the employment of small-cap side heads to the paragraphs of the syllabi—indicate the care and ability of the reporter. We can not pay the reporter a higher compliment, perhaps, than to say, with reference to his syllabi, that they are models of excellence, and that we have with pleasure made use of them largely in the preparation of the following notes of decisions.

We regret not being able to notice a larger number of the many important and interesting decisions which are contained in the volume.

Trust and Trustee—Estoppel—Unsound Mind.—Mussulman v. Cravens, p. 1, opinion by Buskirk, J. Where a note was given payable to certain persons "for the purpose of erecting and endowing an institution of learning in the city of Logansport, or its vicinity," it was held that the payees were trustees of an express trust, and were proper parties in an action on the note. To such an action, the plea was that the defendant was, at the time of the execution of the note, of unsound mind. A reply that at said time defendant appeared to be of sound mind, and was not known to the plaintiff to be otherwise; and that in reliance on the promise, and before any disaffirmance by him, they had incurred just liabilities for the purpose stated in the note, and that therefore defendant was estopped, was held bad. Wilder v. Weakley's Estate, 34 Ind. 181, distinguished.

Contract—Contradiction by Parol—Set-off.—Benoit, Admr., v. Schneider, Admr., p. 13. Opinion by Downey, J. Action for foreclosure of a mortgage securing a note. Answer that the defendant was a bishop of the Roman Catholic Church, and according to the canons of said church, the real estate of each congregation of his diocese was deeded to him to hold in trust, that the mortgage was on real estate purchased by one of his congregations, and was given to secure a note given by him for money lent by the intestate of plaintiff to said congregation, with the agreement and understanding that said congregation and not defendant was to pay the note. Also that said intestate was the priest of said congregation, and as such collected certain moneys from its members with which to pay its debts, including said note, and had not paid over to the congregation any portion of such moneys. *Held*, that the verbal understanding between the mortgagee and the defendant, could not be set up against the written contract.

Railroad—Right of way—Street. Indianapolis, Peru & Chicago R. R. Co. v. Ross, p. 25. Opinion by Downey, J. The constant and exclusive use of part of a public street of a town by a railroad company for a right of way, can not in any time ripen into an absolute ownership.

Railroad—Exclusive Right to use of tract—Contributory Negligence.—Jeffersonville, Madison & Indianapolis R. R. v. Goldsmith, p. 43. Opinion by Buskirk, J. Between stations and public crossings, a railroad track belongs exclusively to the railroad company, and all persons who walk, ride or drive thereon, are trespassers; and if such persons so walk, ride or drive thereon at the sufferance, or with the permission of the company, they do so subject to all the risks incident to so hazardous an undertaking, and if injured by a train of the railroad company, the company is not liable in damages, unless the injury was wantonly or intentionally inflicted.

This very able opinion is of great interest, as showing a new phase of the doctrine of contributory negligence. The case of Gillis v. Pa. R. R. Co., 59 Penn. St. 129, was followed, and the following were cited: Barker v. Midland Railway Co., 18 C. B. 46; Commonwealth v. Power, 7 Metc. 569; Hall v. Power, 12 Metc. 482; Harris v. Stevens, 31 Vt. 79; Deane v. Clayton, 7 Taunt. 489; Ilott v. Wilkes, 3 B. & Ald. 304; Bird v. Holbrook, 4 Bing. 628; Hounsell v. Smith, 7 C. B. N. S. 731; Binks v. South Yorkshire R. W. Co., 3 Best & S. 244; Lygo v. Newbold, 9 Exch. 302: Knight v. Abert, 6 Pa. St. 472; Lynch v. Nurdin, 1 Q. B. 29; Wilson v. Brett, 11 M. & W. 113; P. Ft. W. & C. R. R. Co. v. Evans, 53 Pa. St. 250; Sherlock v. Alling, 44 Ind. 184, and Lewis v. Balt. & O. R. R. Co., 13 Am. L. R. N. S. 284.

Railroad—Act of Conductor—Commutation Ticket.—Terre Haute and Indianapolis R. R. Co. v. Fitzgerald, p. 79. Opinion by Osborn, J. A railroad company being the owner of one road and the lessee of another, the two forming a continuous line between Indianapolis and St. Louis, sold a "thousand mile ticket," authorizing the purchaser to travel three hundred miles upon one of said roads, and seven hundred miles upon the other, having black figures representing one road and red figures the other, with directions to conductors to punch out the figures accordingly, and a contract signed by the purchaser to the same effect. After all the red figures, representing the number of miles which the purchaser was entitled to travel on the eastern division of the line, had been punched out, the purchaser offered the ticket for passage on a train on the said division, which the conductor refused to accept, and also refused to punch out black figures in lieu of the red. The holder of the ticket thereupon refused to pay fare and to leave the train, and was therefore ejected threfrom by the conductor with force. *Held*, that the terms expressed on the ticket, constituted a contract between the seller and the purchaser of the ticket; that when the purchaser had travelled on the eastern portion of the line, a sufficient number of miles to exhaust the red figures, the ticket gave him no claim to be carried any more on that part of the road; and that his refusal to pay fare, or to leave the car, justified his expulsion therefrom by the conductor.

Married Woman's Note—Mortgage by Husband and Wife of Wife's Separate Estate.—Brick v. Scott, p. 299. Opinion by Buskirk, J. The promissory note of a married woman is absolutely void, and is not evidence of any promise on her part to pay the indebtednss for which the note is given. A mortgage executed by herself and husband on her separate estate to secure such note, can not be foreclosed, nor can a personal judgment

thereon be rendered against her or her husband, the mortgage containing no express agreement for the payment of the amount of the note.

Infant—Disaffirmance of Contract.—Towell v. Pence, p. 304. Opinion by Downey, J. An infant is not required to return or repay the consideration received by him, in order to disaffirm his contract. [See *ante*, p. 343.]

Railroad—Rights of Company and Public as to Crossing.—The Pennsylvania Company v. Krick, p. 368. Opinion by Pettit, J. The rights of a traveller on a highway, where it crosses a railroad, are not subordinate to those of a railroad company, or superior to them, but equal, and both parties must use ordinary care, the one to avoid committing injury, the other to avoid receiving it.

Principal and Surety—Payment—Interest.—White v. Miller, p. 385. Opinion by Downey, J. A surety may, without the request of his principal, pay the debt of his principal before maturity, and after; but not before maturity sue his principal for the money paid. A surety, by delivering his own note with security to the holder of the note of his principal, and receiving the latter note, does not thereby make such payment or satisfaction as to enable him to sue his principal for money paid, until he has paid his own note, when it does not appear that the holder of the note of the principal agreed to receive the surety's note in payment or discharge thereof. Such surety, after payment of his own note, may recover of his principal, with the original amount, interest named in the original note, to the time his own note was paid.

Negligence—Streets—Unguarded Excavation—Notice.—City of Fort Wayne v. De Witt, p. 391. Opinion by Buskirk, J. A city is not liable for an injury to a person caused by falling into an excavation in a sidewalk made by the owner of an adjoining lot, and left open and unguarded, without barriers or lights in the night-time, when no notice of the condition of such excavation was had by the city, and no facts existed from which such notice might be inferred. [See. 1. CENT. L. J. 169, 461, 535.]

Corporation—Ultra Vires—Contract.—The State Board of Agriculture v. Citizen's Street Railway Co., p. 407. Opinion by Downey, J. It is the general doctrine that corporations possess the powers expressly conferred by law, and such implied powers as are necessary to enable them to exercise the powers expressly granted, and no others; yet, although there may be a defect of power in a corporation to make a contract, if a contract made by it is not in violation of the charter of the corporation, or of any statute prohibiting it, and the corporation has by its promise induced a party, relying upon such promise and in the execution of such contract, to expend money and perform his part of the contract, the corporation is liable on the contract. [See, in this connection, Hitchcock v. City of Galveston, *ante*, p. 331.]

Eminent Domain.—Allen v. Jones, p. 438. Opinion by Downey, J. The right of eminent domain lies dormant in the state until legislative action is had pointing out the occasion, mode, conditions and agencies for its exercise; and it should never be exercised except when the public interest clearly demands it, and then cautiously and in accordance with law.

Promissory Note—Alteration by Payee.—Shanks v. Albert, p. 461. Opinion by Pettit, J. The alteration of a note by the payee, after making and delivering, and without the knowledge or consent of the maker, by inserting a higher rate of interest than it would otherwise have borne, and by making it payable at a bank, invalidates the note.

Railroad—Negligence—Stock Drover's Ticket—Free Pass—Contract.—Ohio & Mississippi R. R. Co., v. Selby, p. 471. Opinion by Buskirk, C. J. A drover traveling on a freight train for the purpose of taking care of his stock on the train, for which stock he paid freight, received from the railroad company a ticket called a "Stock Pass," with an endorsement signed by him as follows: "In consideration of receiving this ticket, I voluntarily assume all risk of accidents, and expressly agree that the company shall not be liable under any circumstances, whether by negligence of their agent, or otherwise, for any injury to my person, or for any loss or injury to my property; and I agree that as for me, in the use of this ticket, I will not consider the company as common carriers, or liable to me as such." The court held, in an action for damages for injuries sustained by the drover to his person, caused by the alleged negligent management of the train, that a common carrier can not by contract exempt itself from liability for loss resulting from any negligence on its part (overruling Wright v. Gaff, 6 Ind. 416; The I. & C. R. R. Co. v. Remmy, 13 id. 518; The Ind. Central R. W. Co. v. Mundy, 21 id. 48, and Thayer v. The St. Louis, etc., R. R. Co., 22 id. 26); that said agreement of the drover was invalid as a defence to the action; that said drover was not a gratuitous passenger, but a passenger for hire; and that it was the duty of the company in such case, to so run and manage its train that the plaintiff should not be injured, it being well settled that even where a person riding on a free pass is injured, the carrier is held liable the same as in the case of a passenger paying fare. [See, also, on this subject, N. Y. C. R. R. Co. v. Lockwood, 1 CENT. L. J. 27; Jacobus v. Railway Co., id. 375; Gallin v. London & Northwestern R. W. Co., *ante*, p. 217.] C. A. C.

Summary of Our Legal Exchanges.

WEEKLY NOTES OF CASES, JULY, 1.*

Admiralty—Collison.—The Tonawanda, United States District Court, Eastern District of Pennsylvania, opinion by Cadwallader. J.—1. The enactment of Congress (Rev. St. § 4234), that every sail vessel shall, on the approach of any steam vessel during the night time, show a lighted torch upon that point or quarter to which such steam vessel shall be approaching, does not apply in every case in which a steamer and a sailing vessel may pass near to each other. 2. Where the proximate cause of the collision of a steamer with a schooner was a wrong movement of the steamer by mistake, after the schooner's green light had been sighted, the steamer was condemned as responsible for the whole damage sustained by the schooner, though no torchlight had been shown by her, the lookout from each vessel having been insufficient.

ADVANCE SHEETS OF 66 ILLINOIS REPORTS.†

Railway Negligence—Omission to Ring Bell or Sound Whistle at Crossing.—Chicago and Alton Railroad Co. v. Henderson. [66 Ill. 494.] In an action against a railroad company to recover for the killing of a mule, it appeared that the plaintiff's gate was broken open in the night, so that his mule escaped and got upon defendant's track, where it was killed by a passing train; that the train passed over two public streets in the village without ringing a bell or sounding a whistle, as required by the statute, just before reaching the mule, and that the only signal given, was that something was on the track, which frightened the mule, and caused it to run, but the train was then too near it to be checked so as to avoid the collision, and it appeared from this, that if the statute had been complied with the animal would probably have escaped: *Held*, that the company was liable.

THE WEEKLY REPORTER.‡

Will—Construction—Gift to a Class—Bequest by A. to the Nephews and Nieces of B., "who were Living at the Time of His Decease."—Dimond v. Bostick, before the Lords Justices of Appeal in Chancery. [23 W. R. 554.] A testatrix bequeathed the residue of her estate to "all the nephews and nieces in the first degree of relationship to my late husband, who were living at the time of his decease." The testatrix's husband left nine such nephews and nieces surviving him; two of these died during the lifetime of the testatrix, one before and one after the date of her will. *Held*, that the words "living at the time of his decease" were insufficient to take the case out of the general rule, that in gifts to a class the class must be ascertained at the death of the testator; and that accordingly the seven who survived the testatrix took the whole residue.

Decision of Malins, V. C., affirmed.

Bankruptcy—Vendor and Purchaser—Misrepresentation—Concealment—Purchase of goods after act of Bankruptcy.—*Ex parte* Whittaker. *Re* Shackleton. Before the Lords Justices of Appeal in Chancery. [23 W. R. 555.] A trader, who had been served with a debtor's summons, and with a petition for adjudication thereon, bought goods at an auction, without disclosing his circumstances, and the auctioneer, in ignorance of his circumstances, permitted him to remove the goods without paying for them: *Held*, that the trader was under no obligation to disclose his circumstances, that there was no misrepresentation on his part, express or implied, either at the auction or, under the special facts of the case, on his sending for the goods, that the contract could not be set aside, and that the trustee was entitled to the goods.

Decision of Bacon, C. J., affirmed.

Sale by Auction—Conditions of Sale Incorrect and Misleading—Specific Performance.—Harnett v. Baker, Chancery Court, before Vice-Chancellor Malins. [23 W. R. 559.] An estate was sold by auction in 1872, subject to conditions of sale, one of which was that the beneficial ownership should commence with the will of A. C., dated in 1829, and that the purchaser must assume that A. C. was at the time of his death beneficially entitled to the property in fee simple free from incumbrances. It appeared that in 1824 A. C. had contracted for the purchase of the property, but as the then vendors were unable to make a title, the purchase-money was not then paid by A. C., and it was not in fact until 1867, many years after A. C.'s death, that it was paid and the property conveyed. *Held*, that the condition of sale stated what was not the fact, and that the purchaser was not bound by it; and as the vendor declined to take an open reference as to title his bill for specific performance, was dismissed with costs.

Voluntary Conveyance—27 Eliz. c. 4—Covenant by Grantee to erect or commence to erect a House.—Rosher v. Williams, Chancery Court, before Vice-Chancellor Malins. [23 W. R. 561.] A voluntary

*Philadelphia: Kay & Bro.

†Courtesy of Hon. Norman L. Freeman, Reporter.

‡London: Edward J. Milliken, 12 Cook's Court, Carey St., W. C.

conveyance of land contained a covenant that the grantee would, within a certain period, erect or commence to erect a suitable messuage on the land. The erection of the messuage would not be any benefit to the grantor. *Held*, that the covenant did not take the deed out of the category of voluntary conveyances.

ADVANCE SHEETS OF 55TH NEW HAMPSHIRE REPORTS.*

Obstructing Highways—Towns may maintain Action.—Laconia v. Gilman. [55 N. H. 127.] Towns have a qualified interest in the highways within their limits, which they have constructed and are bound to keep in repair, and may maintaim case for their obstruction. [This question is elaborately discussed, and a great many cases are examined.]

Contracts of Married Women.—Whipple v. Giles. [55 N. H. 139.] The contract of a married woman to pay for services of an attorney in prosecuting a libel for divorce against her husband is not binding. A married woman cannot bind herself by a mere personal contract so that an action can be maintained against her after the coverture has ceased, nor will such contract be implied against her by reason of services rendured during her coverture.

Removal of Causes to Federal Courts.—Whittier v. The Hartford Fire Ins. Co. [55 N. H. 141.] A citizen of this state brought an action in the supreme court of this state against a corporation created by the legislature of the state of Connecticut, and having its principal place of business in the latter state. A trial was had before a jury, who returned a verdict for the plaintiff. Exceptions taken to certain rulings of thr court by the defendants were transferred to the full bench, and overruled, and judgment was rendered for the plaintiff on the verdict. The defendants then sued out a writ of review, and at the September term, 1874, filed a petition for the removal of said action to the Circuit Court of the United States for the district of New Hampshire. *Held*, that under the third clause of sec. 639 of the Rev. Stats. of the United States, providing for the removal of a cause from a state court to the Circuit Court of the United States upon petition filed "at any time before the trial or final hearing of the cause," such a petition cannot be filed after one trial has been had by the parties, although the action is one where review will lie.

To this the learned reporter adds the following note:

"But it would seems that under the construction put by some courts, eminent for learning and ability, upon the act of Congress of March 3, 1875 [see the act, 2 CENT. L.J. 209], state courts no longer have any authority to pass upon the question of removal, or even to consider the sufficiency of the petition or bond etc. * * * The record of removal need not be certified by the judge, and the petition for removal need not be verified by affidavit. The act of 1875 for the first time expressly authorized the petition and bond to be filed out of term-time. We think it was to prevent the state court from proceeding further in the case after the proper papers were filed in the suit with the clerk. It is said there must be a power in the state court to determine whether the petition and bond are sufficient, and whether the cause is removable under the statute. It is true that the party seeking the removal of the cause must be entitled to the same, but we think that the statute did not intend to permit the state court to judge in such a case as this whether a proper case was made; that was one of the difficulties under the former statutes. This statute gives the power to the federal court, the right to determine whether the cause is properly removable. Drummond, J., in Osgood v. The Chicago, Danville and Vincennes R R. Co. See Chicago Legal News, April 17, 1875." S. C., 2 CENT. L. J. 275.

We may add to this, that so far as our information goes, grave doubts attend the question decided by Judge Drummond, in the professional mind, and we doubt whether the bar are prepared to accept that decision as a correct exposition of the statute We have before us an opinion of Judge Morton of the District Court of Kansas, taking a different view of the meaning of the statute, which we expect soon to publish. It may be objected that the opinion of a judge of a state district court ought not to weigh against that of a judge of the reputation of Judge Drummond. But this does not necessarily follow. In this instance it is simply the case of one *nisi prius* judge arguing against another, and the question should be judged according to the reasons advanced; not according to the supposed ability of the respective judges. —Ed. C. L. J.]

*Courtesy of Hon. John M. Shirley, Andover, N. H., Reporter.

Legal News and Notes.

—CHIEF JUSTICE DRAKE, of the United States Court of Claims, has gone to Europe.

—MADAME CRUGER'S will and codicil have been rejected by the Surrogate at New York city, and the motion of Tweed's counsel to quash the new indictments against him has been denied.

—THE Chandler-Buell libel case, has been up again in the United States District Court at St. Louis, on application of Distric' Attorney Dyer, for a writ of removal to the District of Columbia, under a new indictment found by the last grand jury, in session in Washington. This new indictment raises an entirely new question of law, in that it charges the alleged libellous publication to have been made in Washington, by the act of filing the manuscript of the special dispatch to a Detroit newspaper, in the Washington office of the Western Union Telegraph Company. No other complete act of publication is charged in the new indictment, and the appearance of the alleged libel in the Detroit Free Press, is only mentioned incidentally. The case will turn on the question, whether or not the filing of a special dispatch in the office of a telegraph company, constitutes publication in law. The decision of the circuit court on the question of extradition, raised under the former indictment, will be found, *ante*, p. 312.

—A CURIOUS case recently came before the Court of Exchequer Chamber, at Dublin. The will of Edward Cook contained the following passage: "I give and bequeath to my steward, Patrick Doran, £50 sterling, and the same to his wife, Maria Doran," and also "the house and lands of Littlefield, until I am able to live there and enjoy it myself." The testator then added—"I give and bequeath my property in the county of Tipperary, and the county of Kilkenny, to Captain Benjamin Bunbury." It was contended by the plaintiffs, claiming through Captain Bunbury, that the devise of the lands at Littlefield (which were in Tipperary), was void for uncertainty, and that Captain B. took the estate under the latter clause of the will. Evidence was given by the defendants, in explanation of the words "until I am able to live there and enjoy it myself," that the testator was a firm believer in the millennium, and was simply providing for a re-vesting of the estate in himself when he returned to earth with Christ and the saints, when he looked forward to enjoying the property again. The judges ruled that the words, even taking them to be insensible, did not affect or cut down the previously created estate.—[*The Canada Law Journal.*

—DUELS AMONG LAWYERS.—We find the following in the Canada Law Journal:

In the days of Curran and his contemporaries, a duel was an indispensable diploma at the Irish bar, quite essential to success, and sometimes leading to the bench. Below we give a few recorded cases. Lord Clare, afterwards lord chancellor, fought Curran, afterwards master of the rolls. Clonmell, afterwards chief justice, fought two lords and two commoners—to show his impartiality, no doubt. Medge, afterwards baron, fought his own brother-in-law and two others. Toler, afterwards chief justice of the common pleas, fought three persons, one of whom was Fitzgerald, even in Ireland the fire-eater *par excellence*. Patterson, also afterwards chief justice of the same court, fought three country gentlemen, one of them with guns, another with swords, and wounded them all. Curran fought four persons, one of whom became one of his most intimate friends. Many other instances might be mentioned to illustrate the ferocious spirit of these days. In The King v. Fenton, where the prisoner was tried in 1812 for the murder of Major Hillas in a duel, old Judge Fletcher thus capped his summing-up to the jury: "Gentlemen, it is my business to lay down the law to you, and I will. The law says the killing of a man in a duel is murder; therefore, in the discharge of my duty, I tell you so; but I tell you at the same time, *a fairer duel* than this I never heard of in the whole *coorse* of my life!"

STOLEN CORPORATION BONDS—COUNTERFEITED SEAL.—Judge Barrett of the supreme court rendered a decision yesterday in the suit of Martin Haas *et al.* v. The Missouri, Kansas and Texas Railroad Company and Union Trust Company. Haas and others were owners of nine bonds of the Tebo and Neosho Railroad Company, which they claim were at a premium of $125, or about thirteen per cent. The Tebo and Neosho Company leased itself to the Missouri, Kansas and Texas Railroad Company, which issued to the Union Trust Company bonds to take up the old Tebo bonds. Plaintiffs sent in their bonds to be exchanged, and the trust company refused to exchange them, on the ground that these bonds were stolen from their president, Isaac H Frothingham. The referee found that these bonds were signed by the president and secretary of the railroad company, but that the seal of the railroad company was counterfeited, and that the counter seal of President Frothingham was forged. Nevertheless, as the plaintiffs purchased the bonds in good faith, without knowing of these defects, he decides that the bonds are good and that the Union Trust Company must exchange them, and that the Missouri, Kansas and Texas Railroad Company, as the bonds have fallen from 92 to 49, must pay $430 per share cash for the depreciation. Judgment entered in $4,748 03, and the trust company ordered to exchange the bonds.—[*New York Herald*,